BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

COMMENTS OF THE AMERICAN CABLE ASSOCIATION ON THE NOTICES OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

The American Cable Association ("ACA")[1] herein comments on the pole attachment issues raised in the Notice of Proposed Rulemaking *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barrier to Infrastructure Investment*, WC Docket No. 17-84, 32 FCC Rcd 3266 (2017).[2] ACA members are cable, telecommunications, and broadband providers that invest in and deploy high-performance networks to millions of residential and business consumers, community anchor institutions, and other communications providers. While their investments are significant, these providers would invest significantly more if many of the utilities subject to Section 224 of the Communications Act of 1934, as amended,[3] did not hinder attachments to poles, ducts, and conduit and thereby raise the cost of deployments by delaying approvals or levying unreasonable fees.

Attachers face problems in obtaining access to poles, ducts, and conduit for two primary reasons. First, many utilities oppose mandated access to these facilities and have little, if any, incentive to provide access on a reasonable basis. As a result and as discussed at length in these comments, attachers confront a series of barriers in obtaining access to utility poles, including:

1. Utilities may require attachers to file attachment applications to overlash and install drops to customers;
2. Utilities may not provide ready access to relevant and sufficient information about the location and availability of poles;

[1] ACA represents approximately 750 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. These providers pass approximately 18.2 million households of which 7 million are served. Many of these providers offer service in rural communities and more remote areas.

[2] Because pole attachment issues affect wireless deployments, ACA also is filing its comments *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, 32 FCC Rcd 3330 (2017).

[3] 47 U.S.C. § 224.

3. Utilities may not comply with the Commission's timelines for the attachment process;
4. Utilities and existing attachers may take too long to complete make-ready and may charge unreasonable fees.

The second problem attachers face is that the Commission's complaint process has proven to be of little value to attachers, especially smaller entities, in addressing all but the most serious and substantial attachment problems. Thus, despite the Commission engaging in a series of pole attachment proceedings over the past 40 years to "patch" major problems, old problems unresolved by the Commission continue and new problems have emerged. ACA believes this proceeding provides an opportunity for the Commission to adopt additional and more enduring solutions that serve the public interest by facilitating attachments with reasonable fees and recognizing the safety and reliability interests of utilities.

To address the many pole attachment problems identified in these comments, ACA proposes a series of remedies, among which are the following:

Master Agreements

The Commission should adopt rules requiring that applicants are entitled to receive provisions in their pole attachment Master Agreements that:

1. Enable attachers to "Notify and Attach" when overlashing and "Attach and Notify" when installing drops to connect customers;
2. Permit attachers to receive compensatory damages and legal fees when a utility unreasonably delays or denies pole access or charges unjust, unreasonable, or discriminatory fees;
3. Provide for symmetrical indemnification provisions between attachers and utilities; and
4. Limit penalties for unauthorized attachments to an amount no greater than that provided for under the recent Oregon Public Utility Commission's ruling.

Access to Pole Data

The Commission should require utilities to:

1. Develop and maintain a searchable electronic database of the location and availability of poles, ducts, and conduit that are installed, replaced, or upgraded after the order in the *Wireline NPRM* proceeding takes effect, and make available this database and any other relevant paper or electronic information that the utility possesses regarding its poles to existing and potential attachers, subject to appropriate confidentiality and security protections; and
2. Make available to attachers a web-based ticket management system for ease of tracking applications and make-ready works.

Application and Survey Requirements

The Commission should:

1. Require every utility to make publicly available, including on its website, its process for accepting and evaluating applications for pole attachments, including the information required and application format;
2. Require utilities to participate in joint surveys of their poles upon an applicant's request;
3. Prohibit utilities from requiring an applicant to pay for engineering design where a visual inspection (or inspection using an electronic database) indicates no work is required; and
4. Prohibit a utility from requiring an applicant to pay for a pole loading analysis where there are two or fewer existing attachers on the pole.

Application to Make-Ready Timeline

The Commission should impose a 90-day timeframe for applications involving 20 or fewer attachments.

Make-Ready by Applicant

The Commission should:

1. Enable attachers, using utility-approved contractors, to undertake all necessary make-ready, including work in the electric space, if a utility or an existing attacher fails to complete make-ready within the Commission's timeframe; and
2. Require a utility to make publicly available, including on its website, a list of at least five approved contractors to undertake make-ready.

Make-Ready Fees

The Commission should:

1. Prohibit utilities and existing attachers from charging for make-ready that is not directly related to the new attachment, including for work to fix existing attachment violations or replace poles determined to be inadequate for existing attachers or scheduled for replacement;
2. Require utilities and existing attachers to provide make-ready cost estimates and final invoices to attachers with itemized details for work on a per-pole basis; and
3. Place the burden on utilities to justify as reasonable final invoice charges that are greater than 20 percent of the estimated charges.

Enforcement

The Commission should:

1. Adopt its proposed 180-day shot clock for resolution of pole-related complaints filed with the Commission; and
2. Impose significant penalties on utilities for pole attachment violations.

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COMMENTS OF THE AMERICAN CABLE ASSOCIATION
ON THE NOTICES OF PROPOSED RULEMAKING

I. INTRODUCTION

The American Cable Association ("ACA") hereby provides comments in response to the Federal Communications Commission's ("Commission's") Notices of Proposed Rulemaking in the above-referenced proceedings.[1] ACA supports the Commission's aim "to better enable broadband providers to build, maintain, and upgrade their networks" by removing "regulatory barriers to infrastructure investment" and reforming "Commission regulations that increase costs and slow broadband deployment."[2] Most importantly, by addressing and remedying key and

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3260 (2017) ("*Wireline NPRM*"); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) ("*Wireless NPRM*").

[2] *Wireline NPRM*, 32 FCC Rcd at 3267, para. 2. *See Wireless NPRM*, 32 FCC Rcd at 3331, para. 2 ("[T]here is an urgent need to remove any unnecessary barriers to such deployment.").

often long-festering problems concerning access to poles, the Commission can "move the needle" significantly to facilitate broadband investments and deployments. In these comments, which are focused on pole attachment issues raised in the *Wireline NPRM*, ACA seeks to buttress Commission action by describing in detail material problems its members continue to face in gaining access to poles and the impact of these barriers on deployments. ACA then provides solutions to address these problems, including by discussing the pros and cons of the "poles" solutions raised in the *Wireline NPRM*.

ACA's over 700 members are investing in and building "broadband America," especially in smaller communities and rural areas, but also in urban areas as competitors to larger providers. ACA members are cable operators, rural telephone companies, and municipal providers that own and operate wireline networks over which they offer voice, video, and broadband services to, among others, residential and commercial consumers and institutions. In the residential market, ACA members' networks pass 18.2 million homes (nearly 19 percent of the homes in the US), almost half of which are in smaller cities and rural areas.[3] In the commercial market, ACA members have and are continuing to expand their networks to provide packet-based Ethernet services to commercial and institutional customers as well as mobile wireless providers.[4]

ACA members have spent more than $10 billion in recent years building out their networks and, spanning the largest to the smallest, ACA members currently are investing approximately $1 billion annually in aggregate to upgrade and extend their facilities.[5] While

[3] American Cable Association, "Connecting Hometown America, How the Small Operators of ACA are Having a Big Impact" (March 2014), available at http://www.americancable.org/node/4728 (last visited June 13, 2017).

[4] *See Wireline Competition Bureau Releases List of Special Access Data Collection Respondents*, WC Docket No. 05-25, RM-10593, Public Notice, 30 FCC Rcd 4462, Attachment A (WTB 2015).

[5] For example, Mediacom Communications, which already deployed more than 600,000 strand miles of fiber, announced "Project Gigabit" in 2016, an additional $1 billion capital investment program to build high-performance broadband facilities in the 1,500 communities within its 22-State footprint. *See*

these investments are significant – and ACA expects them to continue – these numbers mask the reality that ACA members would invest significantly more if many entities that own or control poles, ducts, and conduit did not hinder and raise the cost of deployments by delaying approvals or levying unreasonable fees.[6] In these comments, ACA describes a series of significant problems that occur throughout the pole attachment process – from negotiating agreements to filing applications to completing make-ready – all of which warrant immediate action by the Commission. These problems arise – and unless the Commission acts, will continue to exist and arise – for two primary reasons. First, many utilities[7] oppose mandated access and have little, if any, incentive to provide access on a reasonable basis. Second, as discussed herein, the Commission's complaint process has proven to be of little value to attachers, especially smaller entities, in addressing all but the most major attachment problems. Despite the Commission engaging in a series of pole attachment proceedings over the past 40 years to "patch" major problems, old problems unresolved by the Commission continue and new problems have emerged. Additionally, in some cases, existing Commission regulatory directives are skirted by some pole owners. ACA believes this proceeding provides an opportunity for the Commission to adopt additional and more enduring solutions, and reinforce

Mediacom, "Entire Mediacom Communications Broadband Network to be Gigabit-Ready by Year End" (Dec. 7, 2016), available at https://www.mediacomcable.com/about/news/gigabit-ready (last visited June 13, 2017).

[6] *Ex Parte* Filing of the American Cable Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, and Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421 (Apr. 13, 2017). ACA members also have informed the Commission that their investment in infrastructure has been deterred by the 2015 Open Internet rules. *See* Letter from Barbara S. Esbin, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-108 (May 12, 2017).

[7] In these comments, ACA uses the term "utility" in the same sense as the Pole Act to mean "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." *See* 47 U.S.C. § 224.

earlier determinations, that serve the public interest by facilitating attachments with reasonable fees while recognizing the safety and reliability interests of utilities.

II. NOTICE OF PROPOSED RULEMAKING: REFORMING POLE ATTACHMENTS

In the *2011 Pole Attachment Order*, the Commission continued to move away from relying on private negotiations between attachers and utilities, and revised comprehensively its pole attachment rules in response to barriers imposed by utilities and existing attachers that prevented "reliable, timely, and affordable access."[8] The Commission, in recognition of the "unique economic characteristics that shape relationships between utilities and attachers,"[9] made several significant changes to its rules, including the following:

1. Established a four-stage timeline, with a 148-day maximum timeframe from submission of a complete pole attachment application to completion of the attachment process, although the Commission encouraged more expeditious action;[10]
2. Enabled attachers to engage independent contractors approved by the utility to undertake the survey and make-ready when the work is not completed within the maximum timeframe;[11]

[8] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5241, para. 3 (2011) ("*2011 Pole Attachment Order*").

[9] *Id*. at 5242, para. 4. The Commission also cited report language accompanying the legislation enacting Section 224, which found that a "local monopoly in ownership or control of poles" exists, enabling public utilities to "extract monopoly rents," and that "there is often no practical alternative [for network deployment] except to utilize available space on existing poles." *Id.* (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977), reported in U.S.C.C.A.N. 109).

[10] *Id*. at 5252, para. 23 ("Although we establish this timeline as a maximum, we recognize that the necessary work can often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. It would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted.").

[11] *Id.* at 5265, para. 49.

3. Required electric utilities, when rejecting an attachment request, to explain in detail the basis for such decision;[12]
4. Adopted a new telecommunications rate formula, which reduced the disparity between telecommunications and cable rates;[13] and
5. Encouraged negotiated resolutions to attachment disputes.[14]

ACA members found the reforms adopted in the *2011 Pole Attachment Order* beneficial in enabling reasonable access to poles. Many utilities comply not only with the letter but the spirit of the law and regulations, which translates into lower costs for buildouts and more extensive deployments. However, as discussed below, other utilities continue their rent-seeking behavior by unreasonably delaying pole attachment requests or charging unwarranted fees. ACA describes these problems in detail below, based on the attached declarations and numerous discussions with its membership who attach to poles of utilities subject to Section 224. These members detailed the significant problems they encounter when seeking pole attachments, including:

1. Utilities seek to impose unreasonable provisions in Master Agreements;
2. Utilities have inadequate or incorrect pole inventory databases;
3. Utilities do not have a transparent, efficient, and reasonable attachment application process, which leads to delays and the imposition of additional fees;
4. Utilities and existing attachers take too long to complete make-ready and attachers have inadequate recourse either to force action or undertake work when timeframes expire;

[12] *Id.* at 5254, para. 24.

[13] *Id.* at 5295, para. 126. *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No 09-51, Order on Reconsideration, 30 FCC Rcd 13731 (2015) (revising rate formula to further reduce this disparity).

[14] *2011 Pole Attachment Order*, 26 FCC Rcd at 5286, para. 100.

5. Utilities fail to provide itemized cost estimates for make-ready and seek to charge for work unrelated to new attachments; and
6. The Commission's pole attachment complaint process is ineffective.

These and other concerns described herein warrant the Commission's attention for several reasons. First, the "bad actor" utilities control access to a vast number of poles. Second, these problems are significant and cause harm today, as ACA members rush to deploy network facilities to residential consumers that want higher-speed broadband Internet access service and commercial users that want 100 Mbps+ Ethernet service. Finally, and of real concern for users in sparsely populated communities and rural areas, these problems are more severe for ACA's smaller provider members, which have fewer resources to fight back against utilities many times their size. ACA thus urges the Commission to act promptly to address these problems and offers specific remedies later in these comments.

A. Providers Continue to Face Significant Problems in Attaching to Poles Owned by Utilities Subject to Section 224

Despite the reforms adopted in the *2011 Pole Attachment Order*, cable, telecommunications, and broadband service providers continue to face significant problems at each step of the process to attach to poles owned by utilities subject to Section 224. Notwithstanding these problems, attachers generally favor using utility poles, if they are available at a reasonable cost and without unreasonable delay, because digging trenches and burying conduit can be up to eight times as expensive as hanging wires on poles, depending on the terrain and housing density.[15]

[15] *See* ctc technology & energy, "A Model for Understanding the Cost to Connect Schools and Libraries with Fiber Optics" (October 2014), available at http://www.ctcnet.us/wp-content/uploads/2014/10/Connecting-Schools-and-Libraries-20141017.pdf (last visited June 13, 2017). ctc estimates the typical total cost per mile for new aerial construction is $51,188 versus up to $428,794 for new underground construction. *Id.* at 18, 21, 25.

If the attacher does not have an existing agreement with the utility, the first step is for the potential attacher to negotiate a Master Agreement with the utility that owns the poles, covering the terms and conditions for attachment for a set period.[16] After the Master Agreement is agreed upon (or potentially while negotiations are in progress), the attacher files an application for attachment to specific poles.[17] To complete the application, the potential attacher must have determined the route for its network build, which is typically driven by an internal assessment of its lowest-cost path based on multiple factors, including its estimated costs for make-ready, pole rental fees, and time for the work to be completed by others.

The Commission's four-stage timeline begins when a utility determines that an application is complete.[18] A utility may not act unreasonably in making this determination.[19] The utility then has 45 days to accept or deny the application.[20] During this time, the utility will survey the route and potentially conduct other engineering analyses to determine the feasibility of attachment and necessary make-ready, such as moving communications equipment, replacing a pole, or adding additional supports to meet safety or engineering requirements.[21] Often, attachers – who typically do their own assessments prior to submitting their applications – and pole owners will not immediately agree on how much make-ready work is required.

Once the utility accepts the application, it must provide a cost estimate within 14 days and the attacher has 14 days to accept or reject it.[22] Here again, attachers and utilities often will

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[16] *2011 Pole Attachment Order*, 26 FCC Rcd at 5261, para. 40 (stating a Master Agreement is not a prerequisite for starting the timeline for reviewing pole attachment applications).

[17] *Id.* at 5250, para. 19.

[18] *Id.* at 5255, para. 25; 47 C.F.R. § 1.1420(c).

[19] *2011 Pole Attachment Order*, 26 FCC Rcd at 5255, para. 25 (requiring that any engineering specifications for pole attachment applications must be reasonable).

[20] *Id.*; 47 C.F.R. § 1.1420(c).

[21] *2011 Pole Attachment Order*, 26 FCC Rcd at 5254-55, paras. 24-25.

[22] *Id.* at 5255-56, paras. 26-28; 47 C.F.R. § 1.1420(d).

not immediately agree on the appropriate cost estimate. After the cost estimate is accepted, the utility must promptly notify existing attachers if they need to move their equipment and has 60 days to conduct necessary make-ready involving its own equipment and the poles.[23] In practice, the attacher, rather than the utility, often ends up communicating and coordinating make-ready with other attachers.[24] After the 60 days run, the utility has the option to extend the timeline by 15 days.[25] When those 15 days end, if the utility or the existing attachers have not completed the make-ready involving the existing attachers, the attacher can hire an approved contractor to move the other attachers' equipment, although as explained herein, that process is not often invoked for a variety of reasons or is not seamless.[26]

Based on the attached declarations, conversations with ACA members, and other sources, ACA details in the following section problems attachers experience today in the pole attachment process. Some of these problems are long-standing and the Commission has yet to address them. Others were addressed by the Commission, but the solution has proven inadequate. This proceeding gives the Commission the opportunity to improve the attachment process for all concerned, based on a plethora of attacher experiences, to ensure it serves the public interest. To that end, after discussing the problems with the pole attachment process, ACA proposes solutions to these current concerns.

1. Utilities impose unwarranted and unreasonable Master Agreement terms and conditions

Utilities often seek to impose unwarranted and unreasonable Master Agreement terms and conditions on attachers. Master Agreements govern the rights and responsibilities of

[23] *2011 Pole Attachment Order*, 26 FCC Rcd at 5256-59, paras. 29-35, 47 C.F.R. § 1.1420(e).

[24] *2011 Pole Attachment Order*, 26 FCC Rcd at 5258, para. 32.

[25] *Id.* at 5265-67, paras. 49-53; 47 C.F.R. § 1.1422.

[26] *2011 Pole Attachment Order*, 26 FCC Rcd at 5267-70, paras. 54-61.

utilities and attachers through the entire attachment lifecycle and through multiple attachments. Section 224 requires that pole access rates, terms, and conditions be "just and reasonable."[27] To date, the Commission has refrained from mandating terms and conditions, let alone a specific Master Agreement template, cognizant that utilities may have individual standards and may be governed by differing restrictions under State and local laws. Rather, the Commission determines the reasonableness of pole access rates, terms, and conditions on a case-by-case basis,[28] guided by a limited set of generally applicable rules and policies.[29] Because of the Commission's prior reluctance to adopt regulations governing the contents of Master Agreements, and because pole attachment regulations may be unclear or insufficiently enforced, utilities often exercise their leverage in Master Agreement negotiations to impose unwarranted or unreasonable terms and conditions. Recent problems faced by attachers include:[30]

Full Application Review for Overlashing

Cable and telecommunications providers typically overlash to add capacity to their networks or to run fiber from a splice point to a location that is multiple poles away. The Commission ruled over 15 years ago that applications for such overlashes are unnecessary,

[27] 47 U.S.C. § 224(b).

[28] *2011 Pole Attachment Order*, 26 FCC Rcd at 5246, para. 11.

[29] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16071-74, paras. 1151-58 (1996).

[30] Attachers also report that utilities seek to include provisions in pole agreements that violate Commission rules and orders. For example, the MBO and Cross family of companies, a group of telecommunications service providers in Oklahoma, report that one of the utilities in its footprint includes pole agreement language allowing the utility to set attachment fees exceeding the Commission's rate formula. *See* Declaration of Jake Baldwin, General Counsel for the MBO and Cross family of companies, at para. 4 (June 5, 2017) ("MBO and Cross Declaration"). The offending utility refuses to accept pole applications until the new agreement is signed, effectively holding applications hostage until the attacher accedes to the utility's demands. *Id*. Another ACA member reports that a utility in a State subject to the Commission's framework seeks pole application and make-ready timeframes longer than the maximum timeframe allowed under Commission rules. In addition to being illegal, such provisions increase the costs and timeframes for network deployment.

finding that "neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment,"[31] provided, however, that a utility can deny access for reasons of safety or reliability and charge for make-ready if the overlashing requires strengthening the pole.[32] Nonetheless, some utilities require, or seek to require, additional prior approvals for overlashing projects. ImOn, an overbuilder in Iowa, notes that Alliant, a utility in its territory, requires that all overlashing projects go through the full application process.[33] Another ACA member reports that a utility requires it to go through the full application process for overlashing and then charges fees as high as $1,000 per pole. Requiring prior approval for overlashing violates Commission policy, increases costs, and delays deployments. But applicants may be reluctant to file a complaint with the Commission to avoid damaging their relationships with utilities necessary for future deployments.

Full Application Review for Drops

While utilities generally permit an attacher to "Attach and Notify" to connect drops directly to a customer location from an attacher's facilities on a previously-approved pole,[34] some utilities have used their leverage to add a provision to Master Agreements requiring attachers to file an application for any drop to a customer that involves an attachment to an

[31] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001).

[32] *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 578 (D.C. Cir. 2002).

[33] *See* Declaration of Patrice M. Carroll, Chief Executive Office of ImOn, at para. 8 (June 12, 2017) ("ImOn Declaration").

[34] "Attach and Notify" permits attachers to connect customers upon request and then inform the utility of the new attachment so the utility can charge rent for the pole and review the attachment for compliance with safety codes. *See* N.Y. Pub. Serv. Comm'n, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, Case 03-M-0432, Appendix A (Aug. 6, 2004), available at http://www.utilityregulation.com/content/orders/04NY0432E.pdf (last visited June 13, 2017) ("*N.Y. Pole Attachment Order*").

additional pole, regardless of whether an attacher's equipment is already attached to the pole. These provisions can delay providing requested service to customers for weeks. This issue arises because existing attachers may not be able to reach a new customer from their existing attachments. In these instances, the attacher often needs incidental access to one or more nearby poles to make the customer drop. This occurs, for instance, when a customer is on the other side of the street from a run of attached poles or is a block away from a run. Some utilities that MetroNet, a service provider in the Midwest, attaches to impose this requirement.[35] Alliant also seeks to impose this provision on ImOn, undermining ImOn's goal of connecting homes passed in its footprint within 24 hours of a customer signing up for service.[36]

Requiring full application review of drops is a significant departure from the standard industry practice of "Attach and Notify," based in part on government requirements that cable operators provide service within a limited time.[37] "Attach and Notify" has proven satisfactory for both utilities and attachers, as customer connections use light cables attached with non-invasive clips that add minimal additional load to poles. Utilities agreeing to "Attach and Notify" do not give up their rights to attacher compensation or compliance with safety standards. The turn from "Attach and Notify" to "Apply and Attach" (or even "Notify and Attach") in effect shrinks service providers' markets and limits the potential returns from their broadband buildouts, which disincents investment in such deployments, counter to the Commission's objectives.[38]

Compensatory Damages and Legal Fees

As discussed below, ACA members find the Commission's complaint process to be of little value for many reasons, two of which the Commission can address through requirements in

[35] *See* Declaration of John Greenbank, Executive Vice President of MetroNet, at para. 4 (June 6, 2017) ("MetroNet Declaration").

[36] *See* ImOn Declaration at para. 8.

[37] 47 C.F.R. § 1.1420.

[38] *Wireline NPRM*, 32 FCC Rcd at 3267, para. 1.

Master Agreements. Today, attachers are neither entitled to receive compensatory damages or legal fees when they prevail in a complaint. As a result, ACA members report that utilities have little to lose from demanding unjust and unreasonable terms and conditions, and thus are not sufficiently deterred from continuing to require them. These members further explain that this "skewed environment" overhangs the entire negotiating process and so, by addressing these and other matters set forth herein, the Commission would create a climate that would lead to more productive results for all parties.

Asymmetrical and Non-Reciprocal Indemnification Provisions

In 2014, Mediacom Communications ("Mediacom") filed a petition for declaratory ruling with the Commission to clarify that indemnification clauses in Master Agreements imposing asymmetric and non-reciprocal indemnification liability for negligence on attachers are unjust and unreasonable provisions under Section 224.[39] Mediacom supported its petition by relying on the Enforcement Bureau's 2003 *Georgia Power Order*, which found that the utility's non-reciprocal indemnification provision was not a just and reasonable condition of the pole agreement.[40] ACA supported Mediacom's petition, arguing that an asymmetric indemnification clause violated both the reciprocity principle and the principle that pole attachment agreements must provide that each party be liable for losses that are caused by its own misconduct.[41] The Commission, however, did not issue a decision in response to the petition because Mediacom withdrew the petition as a result of settlement.[42] Consequently, the Commission has not ruled

[39] *See* Petition for Declaratory Ruling of Mediacom Communications Corporation, WC Docket No. 14-52 (filed Feb. 19, 2014).

[40] *See Cable Television Ass'n of Ga. v. Ga. Power Co.*, Order, 18 FCC Rcd 16333 (EB 2003), *recon. denied* 18 FCC Rcd 222871 (EB 2003) ("*Georgia Power Order*").

[41] *See* Comments of the American Cable Association Supporting the Petition by Mediacom Communications for Declaratory Ruling Concerning Indemnification Clauses in Pole Attachment Agreements, WC Docket No. 14-52, at 4 (May 8, 2014).

[42] *See* Letter from Craig A. Gilley, Counsel for Mediacom Communications Corporation, to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, WC Docket No. 14-52 (May 14, 2015).

on this issue and, while ACA believes the issue was addressed and settled by the Enforcement Bureau in the *Georgia Power Order*, ACA members report that one-sided indemnification clauses continue to be proposed by utilities in negotiations for Master Agreements. Thus, this issue of asymmetric indemnification burdens on attachers remains and, given that potential liabilities may be substantial, needs to be addressed.

2. Utilities do not facilitate attachers' access to information about the location and availability of their poles

Attachers would greatly benefit from having access to an online database of information about poles that is created and managed by the pole owner; yet, despite database creation and maintenance being a common practice in firms across industries, many utilities do not provide attachers with readily or easily accessible information regarding the location and availability of poles. As a result, when attachers plan the route for network builds, they typically need to "walk the route" to identify pole location and availability, and determine where they can attach to poles and where they need to change the route. This is time-consuming, inefficient, and may lead to disputes with the utility.

In 2010, the Commission considered requiring utilities to collect and make available information about the location and availability of poles.[43] But it declined to adopt such a requirement in the *2011 Pole Attachment Order*, finding the burdens of creating the database outweighted the potential benefits.[44] In particular, the Commission found that the "data collection would necessarily take significant time," it would be difficult to keep such data up-to-date, and the data may not have much value to attachers.[45] Now, some six years later, ACA

[43] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11897, paras. 75-76 (2010).

[44] *2011 Pole Attachment Order*, 26 FCC Rcd at 5280, para. 89.

[45] *Id*.

can confirm that the Commission's failure to adopt such a data collection requirement has proved costly for attachers.

Utility use of electronic pole databases has increased greatly since 2011 and many utilities share their pole databases with attachers. A recent workshop sponsored by the California Public Utilities Commission demonstrated that utilities in the State have been digitizing their infrastructure records to improve operations.[46] Southern California Edison, for example, uses databases to manage and share pole-related data with joint pole owners and renters.[47] One ACA member points to Alabama Power as an example of a utility that permits attachers to access its pole database.[48] This database, which is kept up-to-date via periodic audits, allows attachers in Alabama Power's territory to quickly identify the location, height, and material type of poles, which helps attachers map routes more quickly and forecast potential make-ready requirements.[49] This reduces the likelihood of disagreements with Alabama Power during the make-ready cost estimate and acceptance stages that can delay deployments.

Nonetheless, many utilities still do not have adequate pole databases or, if they have such databases, they are for internal purposes only and not shared with attachers. This was a major complaint in ACA's discussions with its members. LISCO, a provider of broadband and telephone services in Iowa, reports that no utilities in its footprint provide such pole databases.[50] USA Communications, a cable operator in Nebraska, Montana, Colorado, Alabama and

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[46] Cal. Pub. Utils. Comm'n, *Pole and Conduit Databases & Application, Workshop*, available at http://www.cpuc.ca.gov/general.aspx?id=6442453019 (last visited June 13, 2017).

[47] So. Cal. Edison, *Pole Database Workshop* (Mar. 17, 2017), available at http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453014 (last visited June 13, 2017) ("*Edison Pole Database Workshop*").

[48] *See* Declaration of Chris Hilliard, Chief Executive Officer of USA Communications, at para. 6 (June 13, 2017) ("USA Communications Declaration").

[49] *Id.*

[50] Declaration of David Magill, Vice President of Administration and Legal of LISCO, at para. 7 (June 5, 2017) ("LISCO Declaration").

California, reports that only one utility in its footprint has digital databases with pole plant information.[51] Other ACA members report that many utilities have electronic records of their poles, but do not make them readily accessible to attachers. As a result, when attachers are working on pre-application documentation, they must spend time "walking the route" to determine the identity of existing attachers and scheduling appointments with utilities to review maps or databases maintained at their offices. This results in attachers having to incur significant time and costs to collect information that the pole owner already has, or the pole owner could have easily collected and retained from its previous work on the pole, which in turn limits attachers' builds.

3. Utilities unreasonably delay review and approval of applications

In the *2011 Pole Attachment Order*, the Commission adopted a detailed timeline for processing attachment requests to "give necessary guidance to both pole owners and attachers" and end "excessive delays."[52] Yet, ACA members continue to experience delays in the review and approval of attachment applications. In some instances, utilities ignore the timeline. In other instances, utilities take the maximum period allowed even though the requests are for simple attachments. Below ACA elaborates on these problems.

a. Utilities often take longer to process applications than the maximum timeframes permitted under the Commission's rules

Despite the requirement that utilities perform pole surveys and provide a response to a complete application within 45 days,[53] ACA members report that utilities often exceed this timeframe for a variety of reasons. A leading reason is that, contrary to the Commission's

[51] USA Communications Declaration at para. 6.

[52] *2011 Pole Attachment Order*, 26 FCC Rcd at 5250-51, para. 21.

[53] 47 C.F.R. § 1.1420(c). An additional 15 days is permitted for larger orders. 47 C.F.R. § 1.1420(g).

admonition that they act diligently,[54] utilities do not assign sufficient engineering staff to process pole applications.[55] This is especially troubling when attachers request a small number of attachments, often to allow them to reach prospective new end user locations, which the utilities should be able to handle in two to three weeks. In Montana, USA Communications experienced a delay of over a year on an application for eight pole attachments to connect five commercial customers because the utility only assigned one engineer to review survey reports and respond to applications.[56] MetroNet similarly has been waiting more than a year for approval of applications for 160 pole attachments because the one employee responsible for reviewing applications was out on extended medical leave.[57]

ACA has found from discussions with its members that some utilities refuse to conduct joint surveys with attachers. As a result, when an attacher's application is rejected or the utility provides high-cost estimates for make-ready, the attacher often lacks the information necessary to challenge these findings. For example, LISCO reports that one of the two utilities in its footprint refuses to do joint surveys, which is one of the reasons it consistently has to engage in time-consuming negotiations with the utility to agree on necessary make-ready.[58] By contrast,

[54] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5254, para. 24.

[55] The utilities acknowledge this problem. A survey from the Utilities Telecom Council indicated that the "size" and "volume" of applications were the reasons behind 58 percent of the applications that took longer than 45 days to process. In all, 19 percent of applications took longer than 45 days to process. *See* Comments of Utilities Telecom Council, WC Docket No. 07-245, App'x, The Problem with Pole Attachments: A White Paper, at 13 (Mar. 7, 2008).

[56] *See* USA Communications Declaration at para. 4.

[57] *See* MetroNet Declaration at para. 5. Problems also arise when utilities outsource pole application review and attachment engineering design to third parties. These third parties may be located far from the relevant poles or lack personnel in all areas within the utility's footprint, requiring additional logistics and travel time to perform pole surveys and collect data to evaluate attachments. LISCO, for example, has experienced these problems in dealing with the third party that executes pole surveys and engineering work for an investor-owned utility in southeast Iowa. *See* LISCO Declaration at para. 3. Because the third-party engineers surveying poles in its footprint are not in the same State and need to travel, they are frequently delayed in undertaking their work. *Id.* Other ACA members have reported that their local utility has taken longer to process applications since it outsourced pole management to a firm not located in the area.

[58] *See id.* at para. 4.

attachers who have the option of conducting joint surveys report that the surveys allow them to discuss and resolve issues with the utility's local engineers in real-time. They additionally report that joint surveys provide them with an opportunity to discuss alternatives to the utility's initial solution or dispute certain assessments, which may result in the utility's engineers taking the suggestions of the attachers. While attachers' representatives do not always agree with the assessments of the utility's engineers, disputes over make-ready estimates are rare following joint surveys because the attacher has clarity into the reasoning for the make-ready estimate. The net result is fewer delays and disputes during the estimate acceptance process.

b. Utilities fail to automate tracking of applications

Automatic tracking of pole attachment applications by utilities speeds the attachment process. Today, the majority of utilities in 30 States use the web-based National Joint Use Notification System ("NJUNS") that allows them to track work on jointly owned poles.[59] Additionally, at least 22 utilities in 38 States use NOTIFY, a software product that provides database and workflow management for infrastructure projects.[60] These systems allow attachers to track the status of work on their applications. But for providers that need to attach to utilities that have lagged in adopting these systems, delays can take longer to identify and resolve. For example, when an attacher sends required documentation to a utility via email or through an online portal, the attacher often must contact the utility directly by phone or email to learn its status and further prosecute its applications. Such *ad hoc* communications may lead to delays in learning about application problems, or the exchange of imprecise or insufficient information regarding problems, requiring further communications and potentially managerial

[59] *See* NJUNS, *Who We Are*, available at https://web.njuns.com/about/ (last visited June 13, 2017); NJUNS, *Members*, available at https://web.njuns.com/members/ (last visited June 13, 2017).

[60] *See* Alden Systems, Inc., *Our Clients*, available at https://www.aldensys.com/about-us (last visited June 13, 2017); *see also* Alden Systems, Inc., Presentation to Ca. Pu. Utils. Comm'n, available at http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453012 (last visited June 13, 2017) (providing number of States using NOTIFY system).

escalation to get specific information regarding an application's status that should be easily attainable.

c. The Commission's timeframes encourage utilities to take the maximum amount of time to process simple pole attachment applications for a small number of attachments

ACA members report that utilities often take the maximum amount time for simple applications for a small number of attachments. Although the Commission's timeframe helps determine rollout plans and the assignment of resources, it does not provide sufficient incentive for utilities to accelerate the review process, notwithstanding the Commission's direction that utilities act diligently and respond to applications well before the maximum timeframe.[61] There is no justification not to move more quickly on applications to attach to a relatively small number of poles (*e.g.*, fewer than 20)[62] or on applications that do not present unusual issues. As one example, Alliant Energy uniformly responds to ImOn's pole applications at the end of the prescribed timeline, despite ImOn providing all requested information and volunteering to do anything else needed to accelerate access.[63]

In the *2011 Pole Attachment Order*, the Commission stated that "[i]t would not be reasonable behavior for a utility to take longer to fulfill any [pole attachment] requests simply because a timeline with maximum timeframes is being adopted."[64] Taking the maximum amount of time to approve even simple pole attachment applications not only deters network investment but undermines the Commission's objective of enhancing competition, particularly in the market for business data services.[65] In a dynamic market, it is untenable for a provider to

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[61] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5252-55, paras. 23-24.

[62] Utah's rules identify small pole applications as covering 20 or fewer proposed pole attachments. *See* Utah Admin. Code r. 746-345-3.

[63] *See* ImOn Declaration at para. 4.

[64] *2011 Pole Attachment Order*, 26 FCC Rcd at 5252, para. 23.

[65] *See Bus. Data Servs. in an Internet Protocol Env't, et al*., WC Docket No. 16-143, *et al*., Report and Order, 32 FCC Rcd 3459, 3461, para. 1 (2017).

sign up a customer and then wait five months for pole access to service new locations or extend lines. Customers want their requested service quickly and know incumbent providers can deliver it. In addition, incumbents already attached to poles can take advantage of a request that it move attachments to alter market conditions prior to the arrival of competition. Incumbent competitors may offer shorter response times to connect new locations, lower subscription fees, or include additional features to retain existing customers, detrimentally affecting the business case for a new entrant's projects. The experience of a competitive provider in Oklahoma affiliated with the MBO and Cross family of companies provides an example. It has been forced to give new commercial customers six-month lead times to connect because the investor-owned utility refuses to grant its applications and enable attachments expeditiously, even for small-size attachments.[66] This service provider believes it has lost business opportunities to incumbents because customers are unwilling to wait that long to get service.[67]

The reluctance of some utilities to respond to applications promptly is particularly troubling because ACA members also work with "good actor" utilities that address their pole attachment applications in a timely manner. As one example, LISCO has received application turnarounds from some utilities within 21 days.[68] In addition, ImOn has had positive experiences with MidAmerican, which completed review of an 89-pole application in two weeks.[69] These examples demonstrate that an expedited pole access process is possible and that certain utilities unreasonably delay pole access in violation of the Commission's rules.

[66] *See* MBO and Cross Declaration at para. 3.

[67] *Id.*

[68] *See* LISCO Declaration at para. 6.

[69] *See* ImOn Declaration at para. 10.

4. Make-Ready is a chief source of unjustified delays, as attachers face opaque and unreasonable actions by utilities and existing attachers

To proceed with new pole attachments in compliance with safety code standards, utilities engage in make-ready works – the rearrangement of both electrical equipment and communications cables installed on poles to maintain proper safety clearances. Many delays in the pole attachment process occur during this stage, largely because of pole owners and existing attachers' unwillingness to comply with existing timelines and unreasonable demands imposed on attachers by utilities. For example, utilities often delay make-ready work due to unresponsive existing attachers and try to push the responsibility for coordinating make-ready work to the attacher. Moreover, pole owners typically require that the attacher fix code violations the attacher did not cause and impose fees for pole maintenance unrelated to the new attachment. ACA discusses these and other concerns below.

a. Make-ready work often is delayed because utilities and existing attachers are unresponsive or fail to coordinate

ACA members have experienced make-ready delays for multiple reasons. In some instances, existing attachers may not respond to requests to undertake work or move their cables and equipment promptly within the make-ready timeline.[70] This issue was one of the top problems identified by most ACA members. MetroNet reports that existing attachers frequently do not conduct their make-ready within the normal 60-day timeframe.[71] Another ACA member in Missouri reports that a single pole attachment owned by an unresponsive incumbent held up work on a 200-mile middle mile project.

Another reason for delay is that utilities either do not contact existing attachers or do not provide applicants with a cost estimate covering both utility and existing communications

[70] 47 C.F.R. § 1.1420(e)(1).

[71] *See* MetroNet Declaration at para. 7.

attacher make-ready.[72] One ACA member reports that it must directly contact existing attachers and request they move their equipment because the utility refuses to provide such information. In Indiana, utilities required MetroNet to directly contact existing attachers and request cost estimates of make-ready works in the communications section of poles.[73]

Make-ready delays also occur because utilities fail to undertake work where an existing attacher is unresponsive, despite the *2011 Pole Attachment Order* allowing them to exercise authority to finalize make-ready works within 15 days after the standard make-ready period if existing attachers fail to do so.[74] An ACA member experienced this issue, which in some instances caused it to simply give up and find an alternative route. ACA members recognize that utilities do not want to move existing attacher's wires and cables because of the potential lack of clarity on liability in the event of property damage, accidents, or service interruptions. But such coordination is critical to the pole attachment process and should not be the sole responsibility of the attacher.

b. Utilities require an attacher to fix code violations the attacher did not cause

As part of the make-ready process, utilities may require attachers to fix code violations the attachers did not cause. Some ACA members report that utilities frequently include activities in the make-ready works to resolve safety violations caused by existing communications attachers. For example, ImOn found that Alliant charged it to fix violations

[72] The *2011 Pole Attachment Order* does not say explicitly that utilities are responsible for make-ready cost estimates covering existing attachers, but it does imply this is the case. The Order states that, "[u]pon receipt of payment from the attacher, we require a utility to notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready," implying that "planned make-ready" is inclusive of moving existing attachers' equipment. *2011 Pole Attachment Order*, 26 FCC Rcd at 5256, para. 29. *See* 47 C.F.R. § 1.1420(d) (stating a utility "must present to a requesting entity an estimate of charges to perform *all necessary make-ready work*") (emphasis added).

[73] *See* MetroNet Declaration at para. 6.

[74] 47 C.F.R. § 1.1420(e)(1)(iv).

created by existing attachers.[75] In other instances, an existing communications attachment is deemed in violation because of action taken by the utility. For instance, an investor-owned utility in Minnesota charged Mediacom to fix violations on poles to which Mediacom had been attached for 20 years caused by the utility moving its equipment during pre-make-ready inspections for a new attacher.[76] The Commission has found that requiring attachers to pay for the correction of violations caused by other attachers is unreasonable, and that attachers need only pay for the additional costs of accommodating their attachments.[77] In sum, attachers should not be responsible for correcting violations caused by others.

c. Utilities require new attachers to undertake general pole maintenance unrelated to the new attachment

ACA members report that utilities require as part of their make-ready that new attachers replace or undertake substantial work on "failing" poles that cannot sustain the load of existing equipment and cables. This results in disputes and additional on-site inspections and technical evaluations by attachers and utilities, pushing back make-ready completion dates. ImOn has been regularly subject to utility claims that it needs to undertake corrective maintenance in make-ready work.[78] Mediacom also received cost estimates that include the replacement of failing poles, even when the poles would have failed without Mediacom's attachments.[79] ACA members understand that failing or inadequately maintained pole infrastructure represents a major risk for accidents and service interruptions in surrounding communities and that utilities

[75] *See* ImOn Declaration at para. 6

[76] *See* Declaration of William Wegener, GVP of Engineering and Network Development at Mediacom Communications, para. 5 (June 5, 2017) ("Mediacom Declaration").

[77] *See Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, para. 19 (1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL [the pole owner] and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.") ("*Kansas City Cable Partners*").

[78] *See* ImOn Declaration at para. 6.

[79] *See* Mediacom Declaration at para. 5.

need to ensure the safety and reliability of poles. However, new attachers should not bear the full burden of pole replacement, especially when incumbent attachers pay rental fees to help defray maintenance costs.[80]

5. Utilities impose unreasonable fees for standard pole attachment applications

Utilities often charge ACA members unreasonable fees for even standard pole attachment applications. ACA members believe that application fees are generally reasonable when they are levied on a per-application, not a per-pole, basis because not all poles need to be surveyed or require engineering design. Many utilities, however, assess engineering fees per pole, regardless of whether such work is needed for a pole. It is generally accepted that where there is only a single or limited number of communications attachers, sufficient clearance exists to proceed with an attachment without rearrangement of electrical equipment or pole replacement and the associated engineering that goes along with this work. But even in situations where visual inspection indicates sufficient capacity (*e.g.*, only one other communications attacher on the pole), ACA members encounter utilities that demand engineering review of, and charge fees for, every pole. Mi-Tech, Alliant Energy's third-party pole management firm, charges engineering fees that can increase the cost of deployment by $1,400 per mile, or roughly $20 per pole.[81]

Utilities also impose unnecessary indirect fees on applicants when they require applicants to conduct pole load analyses for each attachment, even when a simple visual inspection could eliminate this requirement for most poles. To fulfill this requirement, attachers need to hire licensed engineers. Mediacom, which provides broadband service to 1.2 million subscribers in 22 States, reports that pole load analyses can increase its broadband

[80] *Kansas City Cable Partners*, 14 FCC Rcd at 11606-07, para. 19.

[81] *See* ImOn Declaration at para. 4.

deployment project costs by over $5,000 per mile.[82] As a result, attachers bear significant upfront costs to proceed with attachments that do not represent any safety risks.

6. Utilities charge unreasonable fees for make-ready

ACA members continue to find that utilities provide inadequate documentation of make-ready costs and charge unreasonable fees for make-ready work. These excessive fees may stem from many sources, including unreasonable labor fees or work unrelated to the new attachment.[83] Exacerbating this issue, utilities and existing attachers often provide attachers with final invoices far in excess of their original cost estimates and years after the work is complete.

a. Utilities and existing attachers do not provide itemized cost estimates for make-ready work

While utilities must provide cost estimates of expected make-ready works within 14 days after acceptance of an application,[84] the Commission has refrained from adopting requirements for the content or format of these estimates, and some utilities are abusing this ambiguity to provide cost estimates that lack sufficient clarity or detail.

For example, one of the utilities in LISCO's footprint in Iowa provides estimates that are not itemized by pole or task, and the only useful information included is whether the poles need to be replaced.[85] LISCO's investment decision has become binary based upon this limited information: if a pole replacement is allegedly required, LISCO drops the project; if a pole

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[82] *See* Mediacom Declaration at para. 4.

[83] ACA members report that utilities and existing attachers charge above-market rates for make-ready works, often due to the use of labor that is paid by the hour and not by the job, even for routine jobs like moving attachments in the communications space. For a recent project in Montana, USA Communications states it could have done the same work for 25 percent of the utility's cost estimate. *See* USA Communications Declaration at para. 5. Mediacom received a $100,000 invoice for post-attachment maintenance that included above-market labor charges. *See* Mediacom Declaration at para. 6.

[84] *2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 26-28.

[85] *See* LISCO Declaration at para. 4.

replacement is not required, the project continues. MetroNet encounters a similar lack of itemization from a major utility in Indiana.[86] MetroNet only gets additional information if it requests it.[87] In contrast, by having detailed estimates of make-ready costs, LISCO and ImOn found they are able to evaluate the reasonableness of the works more quickly, enter into negotiations with utilities where there are issues in dispute, and make economic decisions about whether to attach their wires or bury them.[88]

The lack of itemization also occurs with invoices that utilities send to attachers after make-ready is completed to bill for any costs above the original estimates (so-called "true-ups"). In Indiana, MetroNet received a final invoice for true-up make-ready in excess of $1 million of the original estimate without any description of the works.[89] Both ImOn and LISCO have experienced the same lack of transparency in final invoices from utilities in Iowa.[90] In sum, so they can evaluate whether charges are reasonable, attachers should be provided with sufficient detail of work and costs both before make-ready is undertaken and after the attachment is completed.

b. Utilities provide final invoices that are far in excess of the original cost estimate

As described above, attachers pay utilities estimated charges prior to make-ready and receive invoices after make-ready is completed that include "true-up" costs. ACA members recognize that it is difficult to estimate all expected costs, but being "off" by 50 percent or more from the original estimate, upon which the attacher relied as a good faith assessment, is unreasonable. Such post-make-ready financial surprises can damage the viability of projects,

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[86] *See* MetroNet Declaration at para. 6.

[87] *Id.*

[88] ImOn Declaration at para. 11; LISCO Declaration at para. 6.

[89] *See* MetroNet Declaration at para. 8.

[90] *See* ImOn Declaration at para. 7; LISCO Declaration at para. 5.

relationships with financing entities, and the provider itself. Moreover, utilities may issue these true-up invoices several years after the work is performed. MetroNet recently received an invoice from a utility in its territory for a project done in 2014 that is $1 million more than the original estimate.[91] In 2016, ImOn was back-billed $126,000 for a 591-pole project for make-ready works performed in 2014.[92] LISCO similarly was back-billed $96,000 in 2016 for make-ready works performed on 36 poles between 2012 and 2014 without any detailed description of works performed.[93] ACA members also have found that disputes over true-up invoices may harm relationships with utilities and result in delays in processing new attachment requests.

B. The Commission's Enforcement Process Continues to Have Serious Flaws

In the *2011 Pole Attachment Order*, the Commission recognized that its enforcement process was flawed.[94] In response, the Commission sought to facilitate the resolution of disputes between attachers and utilities by requiring "executive-level discussions" prior to filing a complaint and by allowing parties to include dispute resolution procedures in their pole attachment Master Agreements.[95] The Commission also modified its penalty standard for unauthorized attachments.[96] However, the Commission declined to adopt, as ACA and others urged, a requirement that compensatory damages be awarded to attachers when utilities unlawfully deny or delay pole access or require unjust and unreasonable pole attachment rates, terms, or conditions.[97] As discussed below, despite the actions taken by the Commission in 2011, ACA members continue to find the Commission's enforcement process inadequate.

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[91] MetroNet Declaration at para. 8.

[92] ImOn Declaration at para. 7.

[93] LISCO Declaration at para. 5.

[94] *2011 Pole Attachment Order*, 26 FCC Rcd at 5285-90, paras. 97-112.

[95] *Id*. at 5286, 5287, paras. 100, 105.

[96] *Id*. at 5290-92, paras. 113-18. *See* 47 C.F.R. § 1.1413.

[97] *2011 Pole Attachment Order*, 26 FCC Rcd at 5288, paras. 107-09.

1. Attachers find the Commission's complaint process is too expensive and will not produce a result in a commercially reasonable timeframe

The experiences of ACA members demonstrate that the complaint process set forth in the *2011 Pole Attachment Order* is too expensive and fails to produce results in a commercially reasonable timeframe. In conversations with its members, ACA has yet to hear of a single instance where a member used the Commission's complaint process, despite one attacher estimating that it could have pursued a complaint in 20-30 percent of its projects.[98] There are many reasons why attachers are so reluctant to file a complaint. The Commission requires that the party filing a complaint needs to present a detailed case upfront and will dismiss complaints for lack of sufficient information.[99] As a result, an attacher filing a complaint incurs from the outset substantial costs, from use of in-house personnel to retaining outside legal counsel and consultants, to prepare the complaint. Incurring these substantial costs is a particular problem for smaller attachers. In addition, the lack of a shot clock for the Commission to resolve pole attachment complaints gives plaintiffs little confidence that their complaint will be addressed in a reasonable timeframe. Complaints also may undermine relationships with utilities, which are critical to facilitate future attachments.[100] The amounts awarded to attachers for prevailing in a complaint are uncertain – or for a small run of poles, may not be that great despite the damages caused to the attacher – and may be insufficient due to the lack of compensatory damage awards. In sum, for small providers, there is too much to lose and too little to gain in using the complaint process – a fact utilities understand and use to their advantage in pole attachment negotiations.

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[98] *See* USA Communications Declaration at para. 7.

[99] 47 C.F.R. §§ 1.1404 *et. seq*.

[100] *See* MetroNet Declaration at para. 9 ("Another reason for our reluctance is the likelihood of the utility retaliating and ceasing/delaying to process applications"); USA Communications Declaration at para. 7 ("Furthermore, USA Communications recognizes that bringing a formal complaint against any utility company could have the unintended consequence of damaging relationships, resulting in further delays down the road").

2. Attachers find the Commission's rule concerning penalties for "illegal attachments" only encourages utilities to assess penalties more stringent than those authorized under the Oregon Public Utility Commission's approach

The Commission's framework for calculating penalties for "illegal attachments" only encourages utilities to assess high fines against attachers. In the *2011 Pole Attachment Order*, the Commission determined "there appears to be a well-founded concern that an unauthorized attachment payment amounting to no more than back rent provides little incentive for attachers to follow the authorization process."[101] On this basis, the Commission abandoned its previous limitation on unauthorized attachment penalties and created a safe-harbor – a rebuttable presumption that contractual penalties based on the Oregon Public Utility Commission's approach would be reasonable.[102] Many attachers argued that this approach would only encourage utilities to seek to impose greater penalties than allowed under the safe harbor.[103] ACA members can now confirm this has come to pass. ACA members have expressed concerns that some investor-owned utilities want to impose unreasonable penalties in their new pole agreements. The Commission must reexamine its methodology for "illegal attachment" fines to ensure utilities do not exercise their significant leverage over attachers to force the acceptance of unreasonable penalty provisions.

C. Solutions to Address Pole Attachment Problems

As explained above, cable, telecommunications, and broadband providers continue to face significant problems in attaching to poles owned by utilities subject to Section 224. Despite the Commission's pole attachment rules, utilities continue to delay access to poles and impose unjust or unreasonable rates, terms, and conditions on attachers. This proceeding provides the Commission with the opportunity to address the many problems ACA has discussed and make

[101] *2011 Pole Attachment Order*, 26 FCC Rcd at 5290, para. 114.

[102] *Id*. at 5291-92, para. 115.

[103] *Id.* at paras. 121-122.

the pole attachment process work better for attachers and utilities. ACA therefore offers the following solutions to the problems it identified, which will lower the financial and temporal barriers to network deployment and allow providers to enhance service to users, including those located in rural and underserved areas.

1. The Commission should impose requirements on pole attachment Master Agreement terms and conditions

Master Agreements for pole attachments, which typically have terms of three to ten years and may have automatic renewal provisions, prescribe the process, timelines, and costs that an attacher and a utility agree to follow when the attacher submits a new pole application. To date, the Commission has been reluctant to provide extensive, explicit guidance about the terms and conditions of Master Agreements that attachers should be entitled to receive if they choose, reasoning that circumstances differ and parties need flexibility to craft provisions that fit specific needs.[104] But, as discussed herein, utilities are demanding terms and conditions that hinder network deployment that they are able to impose because of the Commission's limited engagement. Allowing utilities to make unreasonable demands also fosters disputes, which are costly to attachers (and ultimately consumers) and do not get resolved in a commercially reasonable timeframe. In some cases, the additional time and effort required for an attacher to deal with these onerous terms and conditions and reach a just and reasonable agreement with a utility can delay the start of a project or even cause it to be abandoned. In other cases, utilities may refuse to process applications for new attachments while an existing agreement is being renegotiated, which increases the utilities' leverage in these negotiations and forces attachers to accept unjust and unreasonable terms and conditions.

It does not have to be and should not be this way. Over the past decades, attachers and "good actor" utilities have gotten together and drafted provisions in Master Agreements that are

[104] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5264-65, paras. 46-47.

more equitable and achieve the Commission's goal of expediting the deployment of high-performance networks. The Commission also can find solutions to Master Agreement issues by looking to terms, conditions, and processes developed by many States. In Utah, for instance, utilities file standard contract attachment rates, terms, and conditions, which are reviewed for "reasonableness" by the State regulatory commission prior to taking effect.[105] Additionally, Vermont requires that all pole attachment contracts be submitted to the Vermont Public Service Board to review attachment rates and rental terms,[106] while New York requires pole owners to develop standard terms and conditions that apply to all attachers.[107]

Ideally, given all this spade-work by utilities, attachers, and States, the Commission should be able to adopt targeted rules that dictate key default terms and conditions of Master Agreements that promote network investment and deployment, and prevent utilities from imposing unreasonable terms and conditions or making demands that slow down infrastructure attachments. In particular, ACA recommends that the Commission provide that an attacher may request and receive from utilities the following provisions in pole attachment Master Agreements:

a. Allow attachers to overlash through a "Notify and Attach" process

Attachers, by rule, should have the choice, memorialized in their Master Agreements, to use the "Notify and Attach" process to overlash on poles. Because overlashing generally does not overload poles and is not a new attachment, it is well-established that overlashing can be done through a "Notify and Attach" process. The rule ACA proposes would allow attachers to

[105] Utah Admin. Code r. 746-345-1.

[106] *See* Tit. 30, Ch. 7 Vt. Code R. § 3.704.

[107] *See N.Y. Pole Attachment Order*, *supra* note 34.

demand provisions that allow them to overlash after giving the utility 14-days' notice.[108] This timeframe would permit the utility to determine whether the work would harm the safety or reliability of existing attachments. Should the utility determine that the work would be harmful to the pole or create a safety issue, it would be required to inform the attacher in writing of the specific issues and, during resolution of the issues, it could stop the clock on its response. Should the parties not resolve the problems, the utility could halt work entirely, although the attacher could file a complaint if a resolution is not reached within 15 days and it believes the utility's action was unreasonable. Post-overlashing, a utility would be permitted to audit the work within 90 days of being notified by the attacher that work is complete to determine whether there are any attachment violations.

b. Allow attachers to install drops through an "Attach and Notify" process

Attachers, by rule, should be entitled to provisions that permit them to use the "Attach and Notify" process to install drops. Under such a provision, the attacher would be required to notify the utility within 30 days after the drop attachment and the utility could audit the attachment within 90 days of notification to determine whether there are any violations.

As discussed previously, several ACA members explained that utilities include or insist upon provisions in their pole agreements requiring attachers to submit new pole applications before making any individual end-customer connection (*i.e.*, service drop). This requirement unnecessarily delays the provision of service to customers and undermines attachers' ability to reach new markets. ACA members have highlighted the benefits of "Attach and Notify," and many utilities have codified the practice.[109] At the same time, ACA's proposal provides utilities

[108] Vermont allows overlashing in accordance with accepted engineering standards with only 10-days' notice to the pole-owning utility, Tit. 30, Ch. 7 Vt. Code R. 3.708, and Washington allows overlashing with 15-days' notice to the pole-owning utility. Wash. Admin. Code § 480-54-030.

[109] *See, e.g.*, ImOn Declaration at paras. 8-9; Joint Use Pole Agreement between IPL and AT&T, available at

with the ability to audit the installation of drops so they are able to protect their interest in ensuring the safety and reliability of the attachments.

c. Authorize compensatory damages and legal fees when utilities unreasonably delay or deny access or charge unjust, unreasonable, or discriminatory fees

A utility should be liable for compensatory damages for unreasonably delaying access to poles or charging unjust, unreasonable, or discriminatory fees. As discussed herein, attachers find the cost of the Commission complaint process to be so great and the benefits so little that they rarely file complaints to protect their rights. Utilities know this imbalance and are encouraged to seek to impose unreasonable terms and conditions that delay applicants' ability to make attachments or provide for unjust, unreasonable, or discriminatory fees.

The Commission holds the power to terminate unjust or unreasonable pole access rates, terms, and conditions, and order utilities to provide access under new rates, terms, and conditions.[110] But the remedies available to the Commission do not end there. The Commission also may order a refund or payment to the attacher, commonly representing "the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission."[111] As a result, in response to unjust, unreasonable, or discriminatory charges and fees, the Commission can order "monetary recovery in a pole

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http://webcache.googleusercontent.com/search?q=cache:jH0soDbTPLEJ:agendas.indepmo.org/AttachmentViewer.ashx%3FAttachmentID%3D19079%26ItemID%3D9839+&cd=1&hl=en&ct=clnk&gl=us (last visited June 13, 2017); CenterPoint Energy, "Pole Attachment Guidelines and Procedures" (July 2016), available at http://www.centerpointenergy.com/en-us/Documents/Pole-Attachment-Guidelines-and-Procedures.pdf (last visited June 13, 2017).

[110] 47 C.F.R. § 1.1410(b).

[111] 47 C.F.R. § 1.1410(c). *See* Wash. Admin. Code § 480-54-070(b) (allowing the Washington Utilities and Transportation Commission to "order a refund or payment of the difference between any rate the commission prescribes and the rate that was previously charged").

attachment action to extend as far back in time as the applicable statute of limitations allows."[112] The Commission should exercise this authority and authorize the award of compensatory damages when a utility unreasonably delays or denies access or charges unjust, unreasonable, or discriminatory fees. Although the Commission declined to authorize compensatory damages in the *2011 Pole Attachment Order*, it explicitly stated it would "revisit the proprietary of . . . compensatory damages" if it failed to see improvement in the speed of access and fees charged by utilities.[113] As described above, utilities continue to unreasonably delay and effectively, if not actually, deny access to attachers and charge unjust, unreasonable, or discriminatory fees. Only compensatory damages can make attachers whole and ensure that utilities understand the consequences of withholding the timely pole access necessary for new deployments.

In addition to compensatory damages, attachers should be entitled to an award of legal fees if they prevail in a pole attachment complaint. As currently structured, the complaint process does not deter utilities from seeking to impose unreasonable pole attachment provisions. Allowing the award of legal fees would, in effect, lower the cost to attachers of filing complaints to address violations. Adopting this type of provision would not be novel for the Commission, as it permitted the recovery of legal fees for parties successful in program access arbitration under the *Comcast-NBCU Order*.[114]

d. Ensure symmetrical indemnification provisions between attachers and utilities

Attachers, by rule, should be entitled to provisions in their Master Agreements that provide for symmetrical indemnification obligations among the parties and do not result in attachers being required to pay for damages caused by utilities. As described above, utilities

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[112] *2011 Pole Attachment Order*, 26 FCC Rcd at 5290, para. 112.

[113] *Id.* at 5288-89, para. 109.

[114] *Applications of Comcast Corp., Gen. Electric Co. and NBC Universal, Inc., et al.*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4262, para. 58 (2011) ("*Comcast-NBCU Order*").

may delay make-ready work due to a potential lack of clarity on liability in the event of property damage, accidents, or service interruptions. In response, some utilities attempt to impose the responsibility for any damages arising out of the pole attachment process on the new attacher. As a result, the new attacher is left liable not only for its own negligence and misconduct, but also for the negligence and misconduct of the utility or incumbent attachers. By contrast, symmetrical indemnification provisions "simply would result in each party assuming responsibility for losses occasioned by its own misconduct."[115] The Commission therefore should allow attachers to demand symmetrical indemnification obligations in Master Agreements. Otherwise, utilities and incumbent attachers will continue to unjustly shift the cost for damages caused by their action (or inaction) onto new attachers and not take actions to maximize the safety of their poles.

e. Limit penalties for "illegal attachments" to an amount no greater than that provided for under the Oregon Public Utility Commission's ruling

As discussed above, the Commission reformed its framework for illegal attachment penalties in the *2011 Pole Attachment Order* and created a safe-harbor – a rebuttable presumption that contractual penalties based on the Oregon Public Utility Commission's approach would be reasonable.[116] Specifically, the Oregon Public Utility Commission's approach imposed an unauthorized attachment fee of $500 per pole for pole occupants without a contract.[117] Oregon also imposed an unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection, with an additional sanction of $100 per pole if

[115] *Georgia Power Order*, 18 FCC Rcd at 16346, para. 31.

[116] *2011 Pole Attachment Order*, 26 FCC Rcd at 5291-92, para. 115.

[117] *Id.*

the violation is found by the utility in an inspection in which the pole occupant declined to participate.[118]

However, rather than imposing any discipline against unreasonable illegal attachment penalties, the Commission's safe harbor rule has operated as a dare for utilities to see how far they can go in assessing even greater penalties. In short, utilities have treated the Oregon safe harbor framework as a floor, given the absence of a clear upper limit on the penalties they can rightfully impose on attachers. This is clearly not what the Commission intended and again highlights the unreasonable leverage utilities have over attachers. The Commission thus should fix the problem by adopting a rule allowing attachers to insist that the penalties in the Oregon ruling (or some equivalent) are the maximum penalty that a utility can impose on an attacher for an illegal attachment.

2. The Commission should facilitate attachers' access to information about the location and availability of poles

The Commission should adopt a rule requiring utilities with poles subject to Section 224 to develop and maintain a searchable electronic database of the location and availability of poles, ducts, and conduit that are installed, replaced, or upgraded after the order adopted in the *Wireline NPRM* proceeding takes effect. The Commission also should require that this database, and any other relevant paper or electronic information that the utility possesses regarding its poles, be made available to existing and potential attachers, subject to appropriate confidentiality and security protections.[119] For poles, these databases should include, at minimum, the pole location, pole height, pole grade and available capacity, and if available,

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[118] *Id.*

[119] See CPS Energy, Standard Pole Attachment License Agreement, available at https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/CPS%20Energy%20Standard%20Pole%20Attachment%20Agreement%20(Pro-Forma)%20-%20RevisedVersion%20072216.pdf (last visited June 13, 2017) (holding users liable for any unauthorized use of pole information). Utilities can also sequester sensitive information so that it is inaccessible through the portal that attachers and applicants use.

heights of attachments and age of pole.[120] For ducts and conduit, it should include paths, manholes, and space availability.[121]

In the *2011 Pole Attachment Order*, the Commission declined to require utilities to develop a database of poles and other potential shared infrastructure, determining that "the burdens of such a data collection are outweighed by the potential benefits," pointing to such issues as excessive cost, data security, and the timeliness of data.[122] Since then, internal pole databases used by utilities have become more common, demonstrating that cost, security, and timeliness concerns are surmountable and that many utilities have found sufficient value in creating databases to support their operations.[123] These databases often include some combination of GIS files mapping pole locations, geospatial coordinates (latitude and longitude) of pole locations, and information about pole heights, pole material, available space, and grade.

Searchable electronic databases have numerous benefits to both attachers and utilities: they reduce the time and cost of route planning;[124] they reduce the potential for disputes during the cost estimate process; they help utilities better identify "problem" poles in their footprint and schedule them for maintenance, replacement, or retirement; they ensure that attachers are making payments to the correct parties and that utilities are collecting the full attachment fees they are due; and they ensure that applicants are making requests for pole attachments to the right parties and receiving make-ready estimates from the right parties. In short, databases that

[120] *See, e.g.*, AT&T, "Pole and Conduit Databases & Applications in California" (Mar. 17, 2017), available at http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453013 (last visited June 15, 2017).

[121] *Id.*

[122] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5280, para. 89.

[123] *See, e.g., Edison Pole Database Workshop*, *supra* note 47; SDGE, *Workshop: Pole and Conduit Databases & Applications in California* (Mar. 17, 2017), available at http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453017 (last visited June 13, 2017).

[124] *See* Alden Systems, Inc., "Q&A from CPUC Pole and Conduit Workshop" (Mar. 17, 2017) (stating databases allow attachers to see all routes for deployments, while providing pole details), available at http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453105 (last visited June 13, 2017).

attachers can access as well as utilities make the pole attachment process run more smoothly than when the databases do not exist or are not made available to applicants.

The Commission also should require that utilities make available to attachers at their expense a web-based ticket management system that allows for tracking applications and make-ready works. Utilities would be required to offer the system within two years of the effective date of an order in the *Wireline NPRM* proceeding.[125] As discussed above, the benefits of these systems for tracking works on poles are well-documented.[126] Not only do the great majority of utilities use NJUNS or NOTIFY,[127] both Utah and Connecticut require the usage of NOTIFY,[128] while Maryland directed its electrical utilities to join NJUNS.[129] To deal with those utilities not using such a system, the Commission should mandate that utilities use a web-based ticket management system to track pole attachment applications and make-ready works.

[125] The Commission should require utilities to certify to the Commission that they provided the required web-based ticket management system by the applicable deadline and notified all parties with which they have pole attachment agreements about the system.

[126] *See* Conn. Pub. Util. Reg. Auth., *Report of Pole Attachment Working Group on Recommended Pole Administration Structure* (Feb 28, 2013), available at http://www.ct.gov/occ/lib/occ/6.14.13billworking_group_final_report_022813.pdf (last visited June 13, 2017); Pub. Serv. Comm'n of Md., *A Report on Utility Pole Attachments in Maryland* (Jan. 15, 2016), available at http://dlslibrary.state.md.us/publications/Exec/PSC/HB541Ch431_2015.pdf (last visited June 13, 2017) ("*Maryland Pole Attachment Report*").

[127] *See supra* notes 59-60.

[128] Pub. Serv. Comm'n of Utah, *Order Vacating Scheduling Order and Approving Electronic Notification System for Pole Attachments* (Apr. 27, 2012), available at https://pscdocs.utah.gov/electric/elecindx/2011/documents/223490110351990vsoaaensfpa.pdf (last visited June 13, 2017); Conn. Pub. Util. Reg. Auth., *DPUC Investigation into the Appointment of a Third Party Statewide Utility Pole Administrator for the State of Connecticut* (Oct. 8, 2014), available at http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/325ffcefcd29a07685257d6d0051ae3b?OpenDocument (last visited June 13, 2017).

[129] *Maryland Pole Attachment Report*, *supra* note 126.

3. The Commission should enhance transparency in the pole attachment application and evaluation process

As documented above, delays during the pole attachment Application stage are common. Targeted reforms focused on transparency and barring excessive requirements can accelerate the process and speed up deployments. ACA thus proposes that the Commission require utilities to publish their application requirements and provide attachers with the option of requesting a joint pole survey with the utility, which will offer greater visibility for attachers into what utilities are looking for and concerned about where make-ready is being required. In addition, barring utilities from charging for unnecessary pole loading analyses will reduce the upfront costs of pole attachment without compromising safety standards.

a. The Commission should require a utility to make available on its website and upon request its process for accepting and evaluating applications for pole attachments, including the information required and format

Ambiguity in application requirements can lead to delays, as prospective attachers may unknowingly fail to collect and submit materials sought by the utility and then be forced to correct and resubmit the application. The Commission should address this problem by requiring utilities to post application requirements online, including those related to required fees, engineering plans, drawings, pole load calculations analyses, and route maps, and to follow their posted requirements at the time the application is filed.[130] Such a requirement would provide attachers and utilities with certainty about when an application is "complete." CPS Energy of San Antonio, Texas ("CPS"), and Nashville Electric Service ("NES") of Tennessee each provide a model of transparency by publishing comprehensive materials on their

[130] As part of this requirement, the Commission should ensure the applications are sufficiently detailed so that the attacher clearly knows and understands the information needed for the application. ACA members report that the specific information required to be submitted in an application and the process that the utility will use when reviewing and approving applications are not generally included in Master Agreements.

application processes.[131] Failure by the utility to follow the Commission's requirements would be a violation of the Commission's rules, and ACA recommends that the Commission establish an expedited complaint process to address such violations.

b. The Commission should require a utility to conduct joint surveys of poles at the applicant's request

The Commission should require utilities to participate in joint surveys of poles if an application requests such a joint survey. As discussed above, joint surveys during the application process allow representatives from the attacher and the utility to discuss in real-time any issues and often facilitate solutions. Many, but not all, utilities offer joint surveys as a matter of course.[132] Central Hudson Gas & Electric Corp. provides a good model, whereby its Master Pole Agreement requires the company to give at least five days advance notice of the survey to the attacher and states that the attacher has the right to be present for the survey.[133] The Commission should impose a similar requirement on all utilities.

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[131] CPS Energy, "Pole Attachment Standards" (May 6, 2016), available at https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/Pole%20Attachment%20Standards.pdf (last visited June 13, 2017) ("CPE Pole Attachment Standards"); CPS Energy, "Pole Attachment Standards Workshop" (May 19, 2016), available at https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/Pole%20Attachment%20Workshop_Presentation_19May2016.pdf (last visited June 13, 2017); NES, "Pole Attachment and Conduit Usage Guidelines" (Sept. 15, 2016), available at https://nespower.com/documents/PoleAttachmentGuidelines.pdf (last visited June 13, 2017) ("NES Guidelines").

[132] While many Master Agreements include the option of a joint survey, they are typically vague on the timeline and process. *See, e.g.*, Verizon New York, Pole Attachment Agreement, available at https://www22.verizon.com/wholesale/attachments/pcl/PCL_CT_Pole_Agmt.pdf (last visited June 13, 2017); S. New England Telephone Co., Pole Attachment Agreement, available at http://www.ct.gov/broadband/lib/broadband/ctgig_project/attachment_d_snet_muni_pole_attachment_agreement_3_31_15.pdf (last visited June 13, 2017) ("S. New England Pole Attachment Agreement").

[133] *See* Cent. Hudson Gas & Electric Corp., Standard Pole Attachment Agreement, available at https://www.cenhud.com/pdf/standardpoleattachmentagreement.pdf (last visited June 13, 2017).

c. The Commission should prohibit utilities from requiring an applicant to pay for engineering design where a visual inspection (or inspection using an electronic database) indicates no work is required

Ideally, utilities should charge for applications based on a per-application and per-pole basis since poles often have few attachments, which can be known through a visual determination or use of a utility's electronic database. Yet, that often is not the case, and the attacher is forced to pay for unnecessary work. Accordingly, the Commission should not permit utilities to charge for engineering design work on any pole where a simple visual inspection or examination of a utility's electronic database shows that no work is required.

d. The Commission should prohibit utilities from requiring an applicant to pay for a pole loading analysis where there are two or fewer existing communications attachers on the pole

Because utilities are increasingly requiring pole loading analyses on every pole in an application, irrespective of the condition of the pole or what is attached to it,[134] the Commission should rule that a pole load analysis is not needed where there are two or fewer existing communications attachers on the pole.

ACA understands that requiring these analyses is appropriate because poles continue to age and the number of attachers has increased in most areas. However, an analysis is not required on all poles. In fact, in areas with fewer attachers or otherwise less-stressed poles, ACA members report parties can frequently rely on visual inspection, rather than a loading analysis, to determine whether a pole requires make-ready to support another attacher. CPS provides a good model for pole loading analyses, offering specific constraints around what poles it requires analyses for, including all poles with five or more attachments and all poles with angles of greater than 10 degrees.[135] NES offers a web-based software tool to calculate pole

[134] *See* Mediacom Declaration at para. 4; LISCO Declaration at para. 4.

[135] CPE Pole Attachment Standards, *supra* note 131.

load analyses.[136] Proscribing automatic pole load analyses when there are fewer than three attachers would speed up the pole attachment application process while providing utilities with a sufficient margin of safety.[137]

4. The Commission should impose a 90-day timeframe on applications involving 20 or fewer attachments

The Commission application timelines do not meet service providers' needs, especially when they are connecting new business customers or providing line extensions. In 2011, the Commission accepted that having a specific timeline offers certainty to attachers and allows them to make concrete business plans.[138] There are numerous data points from declarers, utilities, and States indicating that the process can be conducted in significantly less time than the Commission's rules permit. Moreover, a shorter process is essential for providers to serve consumers in a commercially reasonable time or to meet franchise requirements. In many of these cases, to provide service to a new business customer requires just a few new attachments. In other cases, a line extension to serve a few new homes in an unserved area may require approximately a dozen attachments. To ensure that providers can meet the demands of consumers and perform other small projects, ACA recommends that the Commission adopt a 90-day deadline for completion of pole attachments covering 20 or fewer attachments.

Indeed, there is ample evidence that even much larger applications can be processed and make-ready completed in 90 days or less.[139] For example, the Connecticut Department of

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[136] NES Guidelines, *supra* note 131.

[137] The Commission should also consider issuing a Public Notice asking utilities to provide information on how often they require pole load analyses and the percentage of analyses done on poles with three or more attachers where they discovered issues.

[138] *2011 Pole Attachment Order*, 26 FCC Rcd at 5250-51, para. 21.

[139] In 2011, the Commission considered but ultimately declined to adopt a 45-day timeframe for the make-ready phase. *Id.* at 5261, para. 40. However, it noted that such a timeframe should be sufficient for

Public Utility Control ("DPUC") determined that a maximum 90-day process for applications of any size through to completion of make-ready should be sufficient "given the experience and the efficiency that the utility companies have demonstrated to manage such projects in the past."[140] Similarly, LISCO reports that a cooperative utility in its footprint consistently completes the entire process in 90 days.[141]

In the following paragraphs, ACA submits evidence from various sources demonstrating how different stages of the timeline can be completed in periods shorter than the maximum allowable timeframes under the Commission's existing rules. Specifically, ACA proposes a 90-day timeframe for completion of pole attachment applications involving 20 or fewer attachments. ACA's proposal allots 45 days for completion of the application, survey, cost estimate, and acceptance phases, with another 45 days for completion of the make-ready phase.

In the *2011 Pole Attachment Order*, the Commission provided utilities with 14 days to develop make-ready cost estimates after the utility informed the prospective attacher whether it would accept or deny a pole attachment application.[142] The Commission gave utilities additional time to develop make-ready cost estimates to account for situations where the prospective attacher provides the survey data and the utility therefore needs time to review the data and respond to it.[143] However, ACA members indicate that utilities are unwilling to rely solely on applicants' submissions for determining the cost of make-ready. Typically, the process of

uncomplicated pole attachments. *Id.* at 5258, para. 32. The Commission also stated a 45-day timeframe for the make-ready phase should be a "best practice" for medium-size pole attachment requests. *Id.*

[140] Conn. Dep't of Pub. Util. Control, *DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, at 18-20 (Apr. 30, 2008), available at http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/aaea565b8447236e8525743b00643e81?OpenDocument&Highlight=0,Docket,No,07-02-13 (last visited June 13, 2017) ("*DPUC Make-Ready Procedures*").

[141] LISCO declaration, para. 7.

[142] *2011 Pole Attachment Order*, 26 FCC Rcd at 5255, para. 26; 47 C.F.R. § 1.1420.

[143] *2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 27-28.

developing a make-ready cost estimate runs simultaneous — and is indeed inextricable — from the application process. ACA therefore does not believe that utilities require additional time beyond the generous 45-day application processing timeline to develop cost estimates.

Multiple States, utilities, and declarers provide additional evidence that the application and estimate process takes less than the Commission's combined 59 days (45 days for application, 14 for estimate):[144] Utah requires 45 days for both application and estimate phases for pole applications with 20 or fewer attachments;[145] Connecticut's DPUC recommends 45 days for both application and estimate phases for pole applications of any size;[146] CPS Energy requires only 21 days for the application and estimate;[147] and MidAmerican processes applications within about 15 days.[148]

There is also evidence of make-ready taking less than the Commission's 60-day timeframe. New York allows a maximum of 45 days for make-ready of any size,[149] Connecticut's DPUC recommends 45 days for make-ready of any size,[150] and New Hampshire requires make-ready for pole applications of 10 poles or fewer to be conducted within 45 days.[151] In addition, Oregon dictates that parties must negotiate a satisfactory make-ready timeframe when make-ready will take longer than 45 days to complete.[152]

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[144] Unlike the Commission, not all States or utilities make a distinction between the application and estimate stages.

[145] Utah Admin. Code r. 746-345-3.

[146] *DPUC Make-Ready Procedures*, *supra* note 140.

[147] *See* CPE Pole Attachment Standards, *supra* note 131.

[148] *See* ImOn Declaration at para. 10.

[149] *See N.Y. Pole Attachment Order*, *supra* note 34.

[150] *See DPUC Make-Ready Procedures*, *supra* note 140; *see also* S. New England Pole Attachment Agreement, *supra* note 132.

[151] N.H. Code Admin R. 1303.12.

[152] Or. Admin R. 860-028-0100.

In line with the procedures adopted in these "reverse preemption" States, ACA recommends that the Commission adopt a 90-day timeframe for small pole attachment applications covering 20 or fewer poles. Specifically, the Commission should require utilities to provide a make-ready estimate to an attacher within 45 days after receipt of an application and provide utilities with a 45-day period to complete make-ready. If make-ready is not completed within 45 days of an applicant's payment of the make-ready estimate, ACA proposes that attachers reserve "self-help" one-touch make-ready rights, as described below.

5. The Commission should allow applicants to undertake all necessary make-ready when a utility or existing attacher fails to timely complete make-ready

To reduce the likelihood that utilities or existing attachers could delay make-ready for an indeterminate time, the *2011 Pole Attachment Order* provides attachers with a "self-help" remedy to ensure make-ready is completed within a predetermined time period.[153] Following the 60-day period for make-ready, the utility can choose to extend the make-ready timeframe by 15 days.[154] If this additional 15-day period comes and goes without the utility or the existing attachers moving the existing attachers' equipment, the attacher then is given a further 15 days to use a utility-approved contractor to move existing attachers' equipment.[155]

While these "self-help" rules were well-intentioned, the experience of ACA members suggests that, in practice, few utilities are allowing attachers to exercise their self-help rights. The "self-help" remedy provides no protection for a attacher if the utility needs to move its own equipment and does not do so within the 60-day make-ready period, as the Commission's rules only apply to the communications space on the pole, not the electric space. Moreover, the Commission declined to set a minimum number of utility-approved contractors in the *2011 Pole*

[153] *2011 Pole Attachment Order*, 26 FCC Rcd at 5265, para. 49.

[154] 47 C.F.R. § 1.1420(g).

[155] 47 C.F.R. § 1.1420(i).

Attachment Order.[156] ACA believes this lack of specificity has led to utility-approved contractors offering inflated prices for make-ready work. When some utilities provide a list of utility-approved contractors for attachers to use, the list is so small — one or two names — that the contractors have little incentive to offer a competitive price.

a. Attachers should be permitted to undertake all necessary make-ready if a utility or existing attacher fails to complete make-ready within the Commission's timeframe

ACA proposes a variation of one-touch make-ready that would be triggered if a utility or existing attacher fails to timely complete make-ready. Specifically, the Commission should allow an applicant to undertake all necessary make-ready by using a utility-approved contractor, including work in the electric space, if a utility or existing attachers has not completed make-ready within the timeframe specified by the Commission. The process would work as follows:

1. An attacher who wishes to reserve an option to conduct "self-help" make-ready will post a performance bond of an adequate size to provide security for all involved parties in the case of accidental damages;
2. Immediately following the end of the make-ready period, the attacher is allowed to contract with a utility-approved contractor to perform all necessary make-ready work in both the electric space and communications space.[157] A utility must provide applicants with a list of at least five approved contractors among which to use to complete make-ready and must certify the list on an annual basis; and
3. The attacher gives seven days' prior notice to the utility and existing attachers before initiating make-ready work on their equipment, and enables them to be present when

[156] *2011 Pole Attachment Order*, 26 FCC Rcd at 5268, para. 57.

[157] The communications utility on the pole would provide the contractors approved to work in the pole's communications space and, if necessary, the electric utility would provide the contractors approved to work in the pole's electric space.

the work occurs. As part of the notice, the attacher shall present evidence of their performance bond.

Providing an option for "self-help" make-ready in both the electric and communications space has precedent in State and local one-touch make-ready regulations. As examples, New York,[158] Oregon,[159] Nashville,[160] and Louisville[161] all allow for some form of "self-help" by applicants for pole attachments. Both Nashville and Louisville provide attachers with an upfront option of performing one-touch make-ready, while New York reserves the "self-help" right only if the utility did not complete make-ready within a prescribed timeframe. Nashville requires new attachers provide 15-days advance notice to existing attachers and Louisville requires 30-days advance notice. ACA proposes a shorter advance notice period of seven days because the utility already had at least 60 days under the Commission's timeframe to complete make-ready before the applicant exercises its "self-help" remedy.

"Self-help" one-touch make-ready better aligns incentives to ensure timely but safe deployment of new plant, while respecting the rights of existing attachers and utilities. ACA's proposed process would provide attachers with greater certainty that their projects will be completed within its proposed 90-day period for attachments of 20 or fewer poles. The process also would provide an incentive for utilities and existing attachers to conduct necessary make-ready works in a timely fashion to prevent other companies from moving their equipment.

[158] *See N.Y. Pole Attachment Order*, *supra* note 34.

[159] *See* Or. Admin. R. 860-028-0100.

[160] *See* Nashville Metropolitan Code § 13.18.020.

[161] *See* Louisville Metro Code § 116.72.

b. Utilities should provide applicants with a list of at least five approved contractors, except where justified, to use to complete make-ready

Commission rules require utilities to give attachers the option to select a utility-approved contractor to conduct make-ready, however, ACA members report that few utilities comply with this obligation. In the rare case that they do, utilities often provide attachers with only one or two contractors from which the attacher can choose,[162] limiting the contractors' incentive to provide competitive bids, either in terms of cost or timing. Whether the Commission adopts ACA's proposed "self-help" make-ready proposal described above or maintains its existing rules, the Commission should expand the minimum number of utility-approved contractors to at least five, except in unusual circumstances. By doing so, the attacher would receive more competitive pricing and it would not unreasonably burden utilities, as evidenced by CPS Energy, who without any regulatory mandate, provides a list of 11 contractors approved to conduct make-ready in Texas.[163] The Commission also should require utilities to post the list of contractors on its website, so that the Commission could easily verify utilities' compliance without having to rely upon complaints from attachers.

6. The Commission should enhance transparency in the make-ready fees charged by utilities

The *2011 Pole Attachment Order* acknowledged, but did not sufficiently address, the problem of excessive make-ready fees.[164] The Commission did not follow the recommendation of the National Broadband Plan that it "[e]stablish a schedule of charges for the most common categories of work (such as engineering assessments and pole construction)" as an additional way to lower the cost and increase the speed of the pole attachment process.[165] The

[162] USA Communications Declaration at para. 5.

[163] *See* CPE Pole Attachment Standards, *supra* note 131.

[164] *2011 Pole Attachment Order*, 26 FCC Rcd at 5243, para. 6.

[165] National Broadband Plan at 111.

Commission also declined to require that utilities make available a common schedule of make-ready charges, although it recognized that such schedules could provide more transparency to providers.[166] Utilities, however, have exploited these gaps by providing attachers with vague and un-itemized pre-job estimates and post-job bills for make-ready work and attempting to charge attachers for fixing existing safety code violations and subsidizing the utilities' own deferred maintenance.

a. The Commission should prohibit utilities and existing attachers from charging for make-ready that is not directly related to the new attachment

ACA members report that utilities seek to have attachers, in addition to paying for any make-ready specifically tied to the additional costs of the new attachment, pay for the utilities' deferred maintenance on poles and often seek to have new attachers pay to clear existing attachers' violations before they can attach their own equipment.[167] These extra make-ready charges add significantly to attacher construction costs and may even cause attachers to build expensive underground routes instead. While the Commission did not include specific prohibitions against these types of charges unrelated to the costs to accommodate a new attachment in the *2011 Pole Attachment Order*, it has found that requiring an attacher to pay for others' violations is unreasonable and that an applicant need only pay for the additional costs of accommodating the new attachment.[168] A number of States and utilities have gone further and codified a prohibition against charges unrelated to accommodating the attachment. As examples, New Hampshire and Vermont prohibit utilities from charging new attachers for fixing existing safety code violations.[169] A number of utilities also include restrictions in their Master

[166] *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86.

[167] *See* ImOn Declaration at para. 6; Mediacom Declaration at para. 6.

[168] *See Kansas City Cable Partners*, 14 FCC Rcd at 11606-07, para. 19.

[169] *See* N.H. Code Admin. R. 1303.07; Tit. 30, Ch. 7 Vt. Code R. § 3.708.

Agreements on acceptable make-ready costs. CPS Energy prohibits charges for the replacement of failing poles and repair of existing safety code violations,[170] while Rocky Mountain Power in its agreement with First Digital Telecom specifically precludes payment by attachers of the entire cost for poles being replaced for Rocky Mountain Power's benefit.[171] By expressly prohibiting these categories of charges from inclusion in make-ready, the Commission would help reduce the cost of construction and promote additional network deployment.

b. The Commission should require utilities and existing attachers to provide make-ready cost estimates with itemized detail on a per-pole basis

The Commission should require utilities to disclose the individual costs that make up the total charges they intend to assess attachers at the individual pole level. Itemized cost estimates allow attachers to quickly evaluate the reasonableness of the estimates provided by utilities and decide whether individual "problem" poles should be bypassed and removed from an application. In many cases, the costs of pole replacement are greater than the costs of short runs of conduit. In these situations, pole-level cost estimates allow the attacher to make the most cost-effective decision for deploying plant. New York regulations provide that make-ready estimates must be "detailed."[172] Oregon regulations require pole owners to provide detailed make-ready estimates for the time and cost of the work.[173] ACA members noted that MidAmerican consistently provides itemized cost estimates prior to make-ready.[174] Other ACA members have also found great benefits to this practice. Requiring utilities to provide more detailed information on a per-pole basis will not impose new burdens. It is only requiring the

[170] CPE Pole Attachment Standards, *supra* note 131.

[171] Pole Attachment Agreement between Rocky Mountain Power and First Digital Telecom LLC (2011), available at https://pscdocs.utah.gov/electric/11docs/11035198/212051Exhibit%20A%20-%20Pole%20Attachment%20Agreement%2012-6-2011.pdf (last visited June 13, 2017).

[172] *N.Y. Pole Attachment Order*, *supra* note 34.

[173] *See* Or. Admin. R. 860-028-0100.

[174] *See* ImOn Declaration at para. 11.

utilities to disclose the individual costs that make up the total charges that they intend to assess the applicant and preventing utilities from hiding unreasonable or simply unnecessary make-ready charges in aggregate cost estimates.

c. The Commission should require utilities and existing attachers to provide post-make-ready invoices with itemized detail on a per-pole basis

ACA urges the Commission to require utilities and existing attachers to provide post-make-ready invoices with sufficient detail on a per-pole basis. The Commission also should place the burden on utilities and existing attachers in a complaint proceeding to justify post-make-ready invoices that differ materially (more than 20 percent) from the estimate. Multiple ACA members reported receiving "true-up" invoices for make-ready that differed substantially from estimates and that included, at best, minimal detail on the work conducted.[175] There is no reason for there to be such a wide discrepancy between the estimate and final invoice, and permitting it to occur only encourages utilities to provide misleading estimates. Moreover, disputes over these invoices impose legal costs on both the attacher and the utility, and may introduce delays into other unrelated pole attachment applications. At the point make-ready has been completed, a utility should be able to identify the make-ready activities it had to conduct on a per-pole basis and the associated itemized costs. New York provides a good model for itemized invoicing by requiring that post-make-ready true-up invoices include, among other items, a description of the work, unit cost of work, cost of itemized materials, and any miscellaneous charges.[176] As mentioned with regard to itemizing pre-make-ready costs, there is no new burden imposed on the utility because the utility is only required to be transparent with the numbers that it used to provide the total charges to the applicant.

[175] *See* MetroNet Declaration at para. 8; LISCO Declaration at para. 5; ImOn Declaration at para. 7.

[176] *See N.Y. Pole Attachment Order*, *supra* note 34.

7. The Commission should strengthen its pole attachment enforcement process

The Commission should make its pole attachment enforcement process more effective and efficient. As explained above, attachers rarely file complaints against utilities for a number of reasons, especially because they are most concerned with time-to-revenue for new deployments. Hitting the pause button on an application to enter a complaint process that is expensive and has no prescribed end point is not an appealing option.

a. The Commission should adopt its proposed 180-day shot clock for complaints

In the *2011 Pole Attachment Order*, the Commission recognized the concerns raised by attachers regarding the length of time taken by the Enforcement Bureau to resolve pole attachment complaints.[177] However, the Commission opted not to modify its complaint rules at the time. Over six years later, the concerns regarding protracted complaint proceedings and the detrimental impacts such delays have on time-to-revenue for new deployments remain. The Commission therefore should adopt its proposed 180-day shot clock for Enforcement Bureau resolution of pole attachment complaints.[178] A 180-day shot clock would harmonize the Commission's resolution of pole attachment complaints with most State complaint resolution timeframes.[179] Moreover, the 180-day shot clock is consistent with the Commission rules requiring "reverse preemption" States to take "final action" on a complaint "within 180 days after

[177] *2011 Pole Attachment Order*, 26 FCC Rcd at 5286, para. 102.

[178] *Wireline NPRM*, 32 FCC Rcd at 3280, para. 3280-81, para. 47.

[179] *See, e.g.*, Tit. 30, Ch. 7 Vt. Code R. § 3.710 (stating Vermont Public Service Board "shall take final action within 180 days after the filing of the complaint"); 220 Mass. Code Regs. 45.08 (stating Massachusetts Department of Telecommunications and Energy "shall issue a final Order on the complaint . . . within 180 days after the complaint is filed").

the complaint is filed."[180] If the State fails to meet the 180-day deadline, jurisdiction for resolving the complaint reverts to the Commission.[181]

ACA also believes that the 180-day shot clock should start upon the filing of the complaint. Both federal law and the regulations adopted in some "reverse preemption" States start the shot clock upon the filing of the complaint.[182] Starting the shot clock upon the filing of a reply by a utility or after discovery is complete would unnecessary delay already lengthy complaint proceedings.[183] The Commission should require the Enforcement Bureau to resolve pole attachment complaints within 180 days of their receipt and impose prompt reply deadlines on utilities to avoid unnecessary gamesmanship.[184]

As proposed by the Commission, the Bureau's ability to "pause" the 180-day shot clock should remain limited.[185] Specifically, the Bureau should be able to pause the shot clock when the parties mutually decide to pursue informal dispute resolution or enter into settlement negotiations, and each expresses the understanding that the shot clock will be stopped as a result.[186] As in the transactions context, the Bureau also should be able to pause the shot clock if the parties need additional time to produce information requested by the Bureau.[187] Such delays should only occur in response to supplemental information requests from the Bureau and

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[180] States may specify a longer timeframe for resolving complaints. 47 U.S.C. § 224(c)(3)(B) (providing that the timeframe cannot "extend beyond 360 days after the filing of such complaint.").

[181] 47 U.S.C. § 224(c).

[182] *See, e.g.*, 47 U.S.C. § 224(c)(3)(B); Tit. 30, Ch. 7 Vt. Code R. § 3.710; 220 Mass. Code Regs. 45.05; *see also* Or. Admin. R. 860-028-0195 (stating shot clock runs after "complaint is filed").

[183] *Wireline NPRM*, 32 FCC Rcd at 3281, para. 48.

[184] *See* 220 Mass. Code Regs. 45.05 (requiring response to pole attachment complaint within 14 days after service of the complaint); Or. Admin. R. 860-028-0070 (requiring response to pole attachment complaint within 30 days after service of the complaint).

[185] *Wireline NPRM*, 32 FCC Rcd at 3281, para. 49.

[186] *Id.*

[187] *Id.*

not because a utility allegedly lacks the resources to timely respond to a complaint.[188] The Bureau should restart the shot clock immediately once it receives the requested information.[189]

Instituting a shot clock as the Commission recommends would provide plaintiffs with greater certainty about when their complaint will be resolved and, more importantly, when their deployment will resume. The shot clock introduces a more prominent "stick" to disincent offending utilities from imposing unreasonable delays or costs into the pole application and make-ready process. ACA notes that nothing prevents the Bureau from conducting its own investigations regarding pole attachment violations in the absence of a complaint.[190] As explained above, attachers may be unwilling to file complaints to avoid damaging the relationships with utilities necessary for new deployments. The Bureau should not wait for a complaint to take remedial action against pole attachment violations. Consequently, the Bureau should launch an investigation to the extent it receives information from broadband service providers, other Commission offices, or any source indicating that a utility is unreasonably delaying access or forcing attachers to accept unreasonable rates, terms, or conditions. Moreover, the Bureau should periodically review utilities' actions to ensure they are complying with any new rules that might require public disclosure.

b. The Commission should impose significant penalties on utilities for pole attachment violations

Commission enforcement, whether though the complaint process or independent investigations, means little unless it results in significant penalties against utilities that violate the rules. In addition to the compensatory damages and legal fees discussed above for attachers that prevail in their pole attachment complaints, the Commission should exercise its authority to

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[188] *Id.*

[189] *Id.* at 3281-82, para. 49.

[190] *See* 47 C.F.R. § 0.111(a)(17) (empowering the Bureau to conduct investigations "in connection with complaints, *on its own initiative or upon request of another Bureau or Office*") (emphasis added).

impose forfeiture penalties against utilities that violate its rules, whether in the course of resolving a complaint or as the result of a separate investigation. The Commission may impose penalties against entities that fail to comply with "any rule, regulation, or order issued by the Commission," including those related to pole attachments.[191] Indeed, the Commission's rules establish a $7,500 base penalty per violation for violations of the pole attachment rules.[192] These base penalties represent a floor and the Commission may increase its forfeitures for intentional and repeated violations, violations causing substantial harm, or for other egregious misconduct.[193] Attachers regularly face unjust or unreasonable rates, terms, and conditions when attempting to access poles, as well as a potential loss of customers when trying to address unreasonable delays, denials of access, or unreasonable or discriminatory charges. Utilities should face significant fines as a result of these violations. The Commission therefore should strengthen its pole attachment enforcement process by modifying its rules to require the Enforcement Bureau to address pole attachment complaints within 180-days of receipt and imposing significant fines when it determines that a utility unreasonably delayed access to attachers or charged attachers unjust or unreasonable fees.

[191] 47 U.S.C. § 503(b). *See* 47 C.F.R. § 1.80(a).

[192] 47 C.F.R. § 1.80(b), Section I, Base Amounts for Section 503 Forfeitures.

[193] 47 C.F.R. § 1.80(b), Section II, Adjustment Criteria for Section 503 Forfeitures.

III. CONCLUSION

For the foregoing reasons, ACA recommends that the Commission establish a more transparent, rules-based regulatory regime for pole attachments by adopting the proposals described herein. By removing barriers to infrastructure investment and reforming Commission regulations that increase costs and slow broadband deployment, the Commission will make the pole attachment process work better for attachers and utilities alike and foster the expansion of service to rural and other underserved areas.

Respectfully submitted,

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June 15, 2017

EXHIBITS

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

DECLARATION OF JAKE BALDWIN

1. My name is Jake Baldwin. I am the General Counsel for the MBO and Cross family of companies, a group that provides broadband, video and communication services to approximately 15,000 residential and commercial customers in Oklahoma. Our new builds have focused on extending our network into new residential areas and building extensions to reach business customers.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. The FCC's current timeframe for attachments is much too long and places us at a competitive disadvantage. Let me explain. Under this timeframe, we have little choice but to establish six-month lead times in our contracts with business customers since in our experience investor-owned utilities in Oklahoma tend to take the full allowed time to respond in every step of the pole access process. Many businesses are unwilling to wait that long, especially when incumbents can provide service within weeks, if not days. In addition, by the nature of the

process, we effectively are giving significant advance notice to our competition, existing communications attachers, that we are building in their market, which gives them an opportunity to respond to our initiatives. We have tried to circumvent the problem where the costs to construct underground are not so great compared to aerial deployments, but this often is not the case. As a result of these problems, it is likely that we have lost opportunities to win new customers to incumbents. The FCC can alleviate some our issues by expediting pole applications and make-ready, especially where we are requesting less than 200 poles.

4. We have also been experiencing difficulties in negotiating a pole attachment agreement with an investor-owned utility in Oklahoma. The utility insists we include a provision that allows the utility to charge higher pole attachment rental fees than the FCC's regulated rate, which it contends reflects a court decision from the Eleventh Circuit, which applies in states not in our footprint. We refuse to accept the provision, but the utility will not budge. As a result, we cannot attach to new poles.

5. We also face difficulties with one rural cooperative that wants to charge pole rental fees that are almost double what we pay for pole attachments to other rural cooperatives and nearly four times what we pay for pole attachments to investor-owned poles. If the cooperative refuses to negotiate the rate down, we would face nearly $30,000 more in pole attachment expense per year for the poles that we currently attach to—money that we would otherwise likely allocate to upgrading or expanding our network in other areas. Burying our facilities is not a cost-effective option in this area given the rocky terrain.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 5, 2017

Jake Baldwin

EXHIBIT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

DECLARATION OF PATRICE M. CARROLL

1. My name is Patrice M. Carroll. I am the Chief Executive Officer of ImOn, a telecommunications operator providing broadband to approximately 16,000 subscribers, video service to approximately 10,000 subscribers and voice services to 2,800 subscribers in markets in Iowa. Since our founding in 2007, we have built new fiber networks in three communities in Iowa, providing customers with more choices for their broadband, video and telephone service. In our markets, we compete with an incumbent cable operator and local telecommunications provider.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. ImOn has been recently deploying fiber to the home (FTTH) networks to provide ultra-high-speed broadband to residential and business customers, expanding our network by 107 miles from 2014-2016, approximately 4,000 homes passed. Our expansion projects include aerial construction on poles as well as underground construction of conduit and a limited amount of

conduit leasing. These projects require significant cooperation from investor-owned utilities in Iowa. With Alliant[1], ImOn is attached to more than 13,000 pole attachments. With MidAmerican[2], we have nearly 579 pole attachments. In a small part of our footprint, we attach to poles owned by rural electric cooperatives. ImOn has experienced both good and bad behavior from investor-owned utilities, which we discuss below.

4. Recently, ImOn has encountered obstacles in dealing with Alliant as we extend our network and connect new residential and business customers. Approximately three years ago, the utility turned over its pole management to a third-party engineering and survey firm, Mi-Tech, and since then, the pole application process has slowed and become less transparent. First, ImOn is required to provide pole location, total cable diameter, proposed attachment height at each pole and existing attachers to each pole. To obtain this information, ImOn has to visit each pole. Alliant's process then requires their third party engineering firm to also visit each pole to take exact measurements. This duplication of efforts costs ImOn an estimated $20/pole. In a large scale project, this extra cost can get into the thousands of dollars. Alliant's third party firm takes the entire allotted timed prescribed by the FCC, regardless of the number of poles in the application. We also found Alliant to take the entire allotted time prescribed by the FCC to respond to pole applications, submit cost estimates and execute make-ready.

5. Second, Alliant has changed its approach on surveys and engineering designs. Prior to outsourcing pole management to Mi-Tech, Alliant trusted our surveys and engineering

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1 In Iowa, Alliant's subsidiary Interstate Power and Light provides electricity to 488,000 customers and has annual revenues of $1,380,000,000. Both numbers are YE2015. *See* U.S. Energy Information Administration, Retail sales of electricity to ultimate customers – Total, all sectors, available at https://www.eia.gov/electricity/data.php#sales.

2 In Iowa, MidAmerican Energy Co. provides electricity to 663,000 customers and has annual revenues of $1,425,000,000. Both numbers are YE2015. *See* U.S. Energy Information Administration, Retail sales of electricity to ultimate customers – Total, all sectors, available at https://www.eia.gov/electricity/data.php#sales.

designs, and limited themselves to reviewing the applications, saving a lot of time and money in engineering fees. Now, with Mi-Tech involved, Alliant requires that ImOn pay for expensive, duplicative engineering analysis, despite the fact that we submit similar information as part of the requirements of the application. Mi-Tech conducts engineering analysis on every pole, even those that clearly do not require make-ready. These additional, unnecessary charges increase the cost of deployment by approximately $1,400 per mile.

6. In addition, we have had a series of problems dealing with Alliant in the make-ready process. Alliant does not provide itemized estimated make-ready costs for ImOn to review, which is critical to our determination about whether to attach or build our own conduit. As a result, once we receive estimates, we have had to engage in extensive additional investigation, which has revealed that Alliant has charged us for items that should not be included in make-ready, such as resolution of other attachers' safety violations, pole replacements due to poor pole maintenance or other routine pole maintenance.

7. In past years, Alliant did not provide estimates and invoiced for make-ready work years after the make-ready was completed. In 2016, we were back-billed $126,000 for make-ready work for a 591-pole project from 2014, without including any itemization of the works and costs. The FCC should require pole owners to provide detailed cost estimates and true-up invoices to bring more transparency to the pole access process.

8. Alliant is also looking to renew our master pole agreement under unreasonable provisions that require us to go through the complete pole attachment application process for every service drop line (which may span several poles, especially if crossing a street) to connect new customers and for any overlashing of wires over our existing attachments. In contrast, the existing practice is governed by "attach and notify," whereby we notify Alliant of service drops

or overlashing soon after we do the work, and Alliant then charges us recurring pole rental fees where applicable. The newly requested requirement on service drops would make it impossible for us to provide one-day installation to residential customers, which is our current promise to new customers. This requirement would put ImOn at a significant competitive advantage to other attachers who are not operating under such restrictions.

9. In contrast to our experiences with Alliant, ImOn has had few problems attaching to poles owned by MidAmerican. Although we have to notify MidAmerican of service drops as well, we do not need to go through the pole application process. Instead, we just inform the utility via email of the new attachments, so that the utility can perform the pole inspection and check the compliance of safety standards.

10. MidAmerican's process timeline has typically been prompt unless there are hold-ups from existing attachers. In a recent 89-pole (submitted) which eventually dropped to 62-pole (attached) application, MidAmerican responded within 15 days to execute a survey and respond to a pole attachment application. In situations where another utility or telecommunications provider is attached, the response takes up to 45 days, through no fault of MidAmerican. If make-ready is required, MidAmerican usually takes two weeks to perform the electrical equipment arrangement on the poles and grant access. Otherwise, ImOn can install fiber immediately.

11. Moreover, MidAmerican provides an itemized cost estimate with the expense required for make-ready. This transparency helps us evaluate make-ready works and decide the most cost effective option to deploy our network. In the same 89-pole project mentioned in the previous paragraph, we found the requested make-ready costs for 20 of the poles would be in excess of the cost of building underground conduit, so we went underground instead.

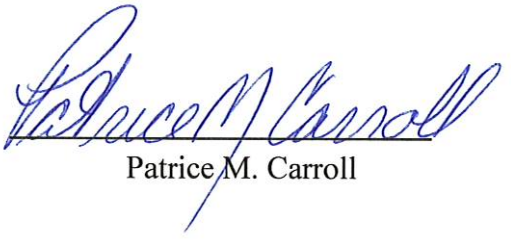
Accessing rights of way ruled by state and local laws

12. ImOn has noticed that municipalities are not diligent in documenting their easements. Outdated, paper-based maps do not accurately depict the location of sewer or gas pipes, leading to accidents while excavating and boring. Communities could ensure better safety conditions and reduce potential risks if consistent GIS information were maintained and shared in advance.

13. Regarding the execution of projects and relocation of existing infrastructure, ImOn has engaged with utilities in joint build agreements to share the costs of excavation. However, ImOn would welcome more participation from competing telecommunications companies to join such initiatives when both ImOn and the other company are building a common route. That practice would reduce costs for everyone and mitigate both traffic and public right-of-way disruption.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 12, 2017



Patrice M. Carroll

EXHIBIT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WTC Docket No. 17-79

DECLARATION OF JOHN GREENBANK

1. My name is John Greenbank. I am Executive Vice President of MetroNet[1], a provider of broadband, video and gigabit data/Internet services to subscribers in more than 30 communities in the Midwest. Since it first launched in 2005, MetroNet has expanded its network throughout many rural and underserved areas, using fiber-to-the-premise (FTTP) architecture to serve residential and business customers (including schools, rural hospitals, and other community anchor institutions) with high-speed connections. Our network is 100% fiber all the way to the home and business. We offer broadband services that help communities grow and compete on the national and international stage. MetroNet epitomizes the goals to make high speed broadband ubiquitous and eliminate the digital divide in urban and rural areas. To enable our network growth, MetroNet has negotiated (and continues to negotiate) agreements with pole-owners, including investor owned, municipal and cooperative utilities. Unfortunately, our

[1] MetroNet is CMN-RUS, Inc., Metro Fibernet, LLC and their affiliated companies

growth is being stymied by our inability to access these utilities' poles in a cost efficient and timely manner.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. MetroNet has faced major challenges accessing poles. While the FCC's *2011 Pole Attachment Order* improved many pole access processes, MetroNet still faces significant barriers that prevent it from rapidly deploying its broadband facilities, such as the following:

a. Despite the make ready time frames set forth in the *2011 Pole Attachment Order*, pole attachment processes, particularly survey and make ready processes, remain slow. In several instances, pole attachment processes imposed by utilities have delayed MetroNet deployments by many months.

b. Although pole rental rates are regulated by the FCC in many jurisdictions, the unregulated, utility imposed charges for make ready work can make deployment of fiber cost prohibitive. In fact, MetroNet has not entered certain otherwise viable markets in need of high speed broadband services because make ready costs of one major utility are so high, a community fiber buildout is not economically viable. High make ready costs can also have a disparate impact in socio-economically challenged areas which are usually located in older sections of communities and rural areas where utility poles are primarily used for the delivery of utility services. In short, high make ready costs broaden the digital divide, deter economic development and deter the deployment of high speed broadband networks.

c. Because there are no monetary penalties, utilities sometimes ignore the law, particularly in instances where the FCC guidance is embodied in orders issued in connection with complaints and not in a rule or regulation.

d. Municipals and cooperatives are not subject to the FCC rules that promote access to poles and impose limits on fees.

e. Some states that have opted to reverse-preempt federal jurisdiction have adopted laws that govern annual attachment rates for cable television providers, but do not have laws governing telecommunication providers' annual pole rates and other important pole attachment matters, such as survey and make ready time frames.

The following are a few examples of challenges MetroNet has experienced. We appreciate the FCC's interest in these matters and believe the FCC should encourage private investment in broadband network expansion, and adopt new provisions that make it easier to access poles, conduit and rights of way.

Accessing poles owned by utilities subject to Section 224

4. *Service Drops*. Prompt delivery of service to customers is critically important. To connect a customer to our network in an area served by utility poles, MetroNet is required to deploy a fiber strand ("service drop") from a fiber distribution terminal located on a utility pole to the customer premises. This route can sometimes span multiple utility poles. We are in over thirty markets, and in any given market, we may have more than 200 customer installations in a month. To meet this demand in a timely fashion, MetroNet must have the ability to connect the customer first and then notify the utility of the attachment of the service drop to the affected utility poles (i.e. "attach and notify"). Service drops add a virtually unmeasurable load to poles and are attached with j-hooks or strand clamps instead of an invasive through-bolt. Because of

this, and the need to deliver service to customers promptly, it is reasonable that service drops be affixed on an "attach and notify" basis. Still, investor-owned utilities often impose seemingly arbitrary and onerous service drop attachment requirements hindering our ability to connect customers quickly. Often, utilities' standard pole attachment agreements do not have provisions that allow MetroNet to affix service drops on an "attach and notify" basis. Accordingly, MetroNet has to expend time and resources in attempting to negotiate inclusion of this critical process. Even when MetroNet has been successful in negotiating the "attach and notify" process for service drops, some utilities require that MetroNet submit a new application for any service drop that requires attaching to more than one pole, regardless of whether our equipment is already attached to the pole. This is burdensome. It would be cost prohibitive for a telecommunications provider to have a fiber distribution terminal on every pole. Rather, a telecommunications provider will have a fiber terminal on one pole from which several drops can be extended sometimes utilizing multiple utility poles between the fiber terminal and the customer premises. It is important to note that MetroNet believes it is appropriate to pay an attachment fee to a utility for all poles to which its facilities are attached including those that only contain a service drop attachment, but does not believe that a multi-month permit application process and pre-approval should be required for service drops. Imposing such a process unnecessarily delays customer installations making it challenging for MetroNet to win customers, and can give incumbent competitors an unfair advantage even if they have slower bandwidth speeds.

5. *Survey Time Frames*. Even though survey time frames are prescribed by the *2011 Pole Attachment Order*, major investor-owned utilities often exceed the established 45-day period to respond to pole applications, thereby frustrating MetroNet's plans to deploy new

broadband in communities. Delays have resulted from a number of circumstances, including refusal by the utilities to dedicate sufficient personnel to review applications and utilities' vague or changing pole application instructions. For instance, in May 2016, MetroNet submitted three applications to one investor owned utility to install fiber cable on a total of approximately 160 poles needed to reach hundreds of customers. We submitted the application and all relevant documentation, including the application form, engineering proposals, drawings, pole load calculations, and route maps. All documentation met the appropriate application requirements as we understood them. Within a few weeks following our submission, we were informed that certain of the information must be submitted as a jpg picture instead of the industry standard digital image. After verbal follow-ups, in the succeeding eight months MetroNet did not receive any explanation or request for additional information. In February 2017, again MetroNet inquired about the status of the application. The utility indicated to us that the one person allocated to review pole surveys had been on medical leave for an extended period. This utility then asked that the information submitted in jpg format be resubmitted in pplx format. As of the date of this declaration, MetroNet has not received approval for these three applications.

6. *Inadequate Details of Make Ready Cost Estimates.* For pole attachments that require make-ready work, cost estimates from investor-owned utilities can be difficult to evaluate. Some major utilities do not provide any documentation or itemization of make ready work estimates—only the total amount for make-ready. With one such utility, we are able to seek additional detail, but the utility requires our response to the estimated make ready within three (3) business days. This hinders our ability to fairly assess the cost estimate, as it effectively reduces the time for accepting or disputing the estimate to a few days.

Another major utility refuses to provide estimates of all make-ready costs. The utility will provide the cost associated with rearranging its own attachments, but not the estimated cost associated with rearranging the attachments of telecommunications providers; the utility has simply left this responsibility to MetroNet, making it more difficult to estimate the total cost and time to execute make-ready work.

7. *Make Ready Delays and Barriers to Attachment.* Even after a make-ready estimate is agreed to, we face challenges in having regulated utilities execute work within the established 60 day timeframe. One large investor owned utility often does not complete make ready work within the 60 day timeframe.

8. *Inadequate Details of Actual Make Ready Costs.* In the post-make-ready stage, we often receive invoices that lack the detail necessary for us to determine the reasonableness of the utilities' make ready costs. There is often no itemization of costs or breakdown of work completed in final bills. In January of 2017, MetroNet received an invoice for over $1 million from a major utility for make-ready work, virtually all of which was performed in 2013 and 2014. This invoice was to "true up" actual make ready costs with the estimated costs given to MetroNet in 2013 and 2014 prior to execution of the make ready work[2]. No detail or cost breakdown or description of work per pole was provided in the "true up" invoices. The specific poles involved were not even identified. Accordingly, we were unable to assess the reasonableness of the make ready cost invoiced by this utility.

[2] The estimates provided in 2013 and 2014 were significantly lower than the actual costs. In many instances, MetroNet would not have proceeded with the make ready work if it had known the final costs. For example, one estimate was approximately $34,000 and the "true up" amount was an additional $138,000. One estimate was $2,000 and the "true up" amount was an additional $21,000. Another estimate was $21,000 and the "true up" amount was an additional $48,000. Although we have asked for it, we have not received an explanation of why the estimate was so wrong.

In negotiating pole attachment agreements, we routinely ask to include a provision that requires invoices for cost based charges to be based upon actual, reasonable costs, and requires the utility, at our request, to provide sufficient detail for us to determine the reasonableness of the cost. Our attempts to negotiate inclusion of such a provision virtually always have been unsuccessful. One utility refuses to "true up" make ready estimates if estimated costs are less than $15,000. In essence, due to the terms of our agreement with this utility, make ready work estimated to cost less than $15,000 may not be based upon actual costs. We feel that the FCC should adopt rules to codify that make-ready estimates and invoices must be based upon actual, reasonable costs and must be sufficiently detailed so broadband providers can verify the reasonableness of such costs.

9. *Complaint Process and Remedies.* We believe that attachers' remedies under the FCC rules are insufficient and should be expanded. Although the self-help remedies set forth in 47 CFR §1.1420(i) may be useful in some situations, they do not help with make ready work outside of the communications space or in situations where pole replacements are required. We believe the remedies set for in 47 CFR §1.1420(i) should be expanded to allow attachers to use utility approved contractors outside of the telecommunications space, including in the electrical space.

Even when a utility is not acting in accordance with the FCC rules, MetroNet is reluctant to file a complaint with the FCC. One reason for our reluctance is the time and expense of filing a complaint. We prefer to try to resolve our issues with utilities through relationships with utility personnel, but this process is also time consuming resulting in costly delays. Another reason for our reluctance is the likelihood of the utility retaliating and ceasing/delaying to process applications. MetroNet would like the rules to be more clear that utilities may not deny or delay

attachment requests based upon the attacher disputing the utility's action or formally or informally filing a complaint.

We believe that 47 CFR §1.1410 should be amended to allow the FCC to impose monetary penalties and assess attorneys' fees and costs.

Accessing poles owned by utilities not subject to FCC oversight pursuant to Section 224

10. *Municipal utilities, cooperatives and reverse-preemption.* MetroNet has experienced delays and obstacles in accessing poles owned by municipal utilities, cooperatives and utilities in states that have exercised "reverse preemption." These utilities are not subject to FCC jurisdiction.

11. For example, Illinois, a state that has opted for reverse-preemption, has rules that dictate pole rate formulas for cable television services, but has few rules that offer meaningful guidance on the pole attachment process. In Illinois, we have experienced a wide disparity between the cable television annual pole rate and the rate that applies to telecommunication providers. For example, one large investor owned utility charges "non-CATV" attachers an annual fee of approximately $24.00 per pole, while it charges cable providers approximately $9.00 per year per pole.

One Illinois investor owned utility will not commit or adhere to the survey and make ready time frames set forth in the FCC rules. Illinois pole attachment laws do not address survey or make ready time frames.

Investor owned utilities in Illinois are not required to allow overlashing and the attachment of service drops on a notice basis and are not prohibited from assessing annual pole rentals on overlashed attachments.

There are no clear criteria in Illinois as to what constitutes reasonable make ready. As a result, we have been subject to unreasonable make ready requirements such as being required to replace poles that do not need to be replaced. In essence, one Illinois utility requires new attachers to finance the utility's pole replacement plan. For example, MetroNet submitted an application to attach its facilities to seventy-nine poles owned by an Illinois investor owned utility. The utility had a survey conducted at a cost to MetroNet of $120 per pole, totaling survey costs of close to $10,000. The survey prepared by the utility recommended that twenty-seven of the seventy-nine poles be replaced. After months and hundreds of hours expended by MetroNet's professionals in disputing the estimate, the utility reduced the number of poles needing replaced from twenty-seven to only two poles. During the dispute process, the utility realized that five poles were not even part of its pole inventory. MetroNet feels that it should not be charged for inaccurate and misleading surveys. Furthermore, if we had been unsuccessful in convincing the utility that two rather than twenty-seven poles needed replaced, we would have had to either abandon our plans to provide service in the community due to the extreme cost of delivery or pay for unnecessary and unreasonable make ready with an estimated approximate cost of $300,000. Because our efforts were successful in disputing the need for so many pole replacements, we estimate that make ready charges for this area will be less than $65,000.

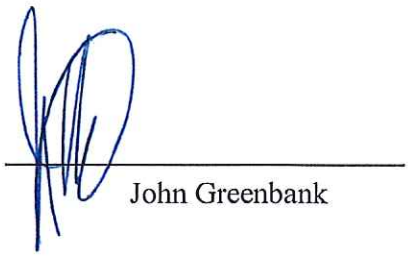
One Illinois utility requires MetroNet to fix safety violations of the utility and third party attachers, which we believe to be contrary to federal law, but is not specifically addressed in the laws of Illinois.

Illinois law does not specifically require that utilities notify existing attachers of necessary make ready affecting their attachments and the time frames in which such make ready must be completed. One Illinois utility has informed MetroNet that this is the responsibility of

MetroNet despite (i) the utility does not indicate the identity of the other attachers in its reports, (ii) MetroNet has no official relationship with the other attachers (certainly no privity of contract), and (iii) in some instances the other attachers are direct competitors of MetroNet with every incentive not to cooperate.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 6, 2017



John Greenbank

EXHIBIT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 17-84
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	
	)	WTB Docket No. 17-79
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	

DECLARATION OF CHRIS HILLIARD

1. My name is Chris Hilliard. I am the Chief Executive Officer of USA Communications. We offer broadband services to approximately 11,000 subscribers, video services to approximately 6,700 subscribers, and basic voice services to nearly 2900 subscribers in communities in Nebraska, Montana, Colorado, Alabama and California. In addition, we serve 1400 business and wholesale customers.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. After the launch of our first network more than 20 years ago in Borrego Springs, California, USA Communications has expanded to communities in Montana, Alabama, Colorado, and more recently, in Nebraska. Over the past three years, we have expanded

our network over 200 miles. We are deploying fiber networks to reach additional residential and commercial areas in small towns and rural communities specifically. Unfortunately, some network builds have been subject to needless delays – the result of private pole owners applying inconsistent standards, including onerous provisions, and imposing unreasonable costs. In small communities and rural areas in particular, these pole owners have made it difficult to access poles. This has limited our ability to build networks in new areas and ultimately interfered with our goal of providing the best quality of services to our customers.

4. USA Communications has experienced delays when accessing poles owned by utilities in the the cities of Laurel and Billings Montana. In a Laurel MT network extension connecting 5 commercial customers, Northwestern Energy took longer than the designated 45-day period to respond to a small 8-pole application. From our experience, these delays occur because pole-owners do not assign sufficient personnel to review applications. In this case, the utility appointed only one engineer to review both survey reports and pole applications, creating bottlenecks in the process. USA Communications has been waiting for over a year, original submission date to receive approval of this pole attachment project.

5. In addition, Northwestern Energy employs only one unionized contractors for make-ready work in both electrical and communication sections of poles. In 2015, we applied to Northwestern Energy for 15 pole attachments in Laurel, Montana. We received a cost estimate of nearly $3,825 for engineering and $6378 make-ready work on 20 poles. In the cost breakdown of the estimate, we noticed that both materials and labor

accounted for nearly 66% of the total estimate and the other third was for the crew's transportation expenses. We could have done the rearrangement of communication wires with our own crews for 20%~25% of the cost charged by the utility-approved contractor. Under the current regime, the electrical make-ready can only be executed by the utility's crews, or one of their approved contractors. When these costs are entirely unreasonable, USA Communications often chooses the less cost-effective, but more viable, option of skipping attaching to poles and building underground conduit.

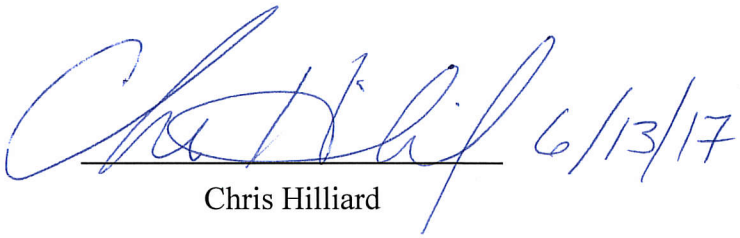
6. A good practice that we have observed in other investor-owned utilities is the execution of periodic audits and repairs to the pole plant. Such preemptive measures benefit all parties – pole owners, existing attachers, and new attachers alike – as pole plant is maintained for less, compliance of safety codes is kept, and there are up-to-date records of the infrastructure. Alabama Power is an example of how well this works. Because it performs pole audits approximately every 3 years, Alabama Power maintains electronic databases of poles that expedite future attachments and support infrastructure management more generally. Unfortunately, no other utility is doing anything similar in our other markets.

7. The FCC's process to dispute make-ready charges or pole attachment complaints is very expensive and extremely time consuming. USA Communications has good reason to pursue a complaint with the FCC in 20% to 30% of our projects. However, we have never filed a complaint because fees for lawyers and consultants could cost $10,000 to $20,000, if not more. Instead, we could use those resources to pursue other solutions (e.g. build our own underground conduit), and continue with our projects. Furthermore,

USA Communications recognizes that bringing a formal complaint against any utility company could have the unintended consequence of damaging relationships, resulting in further delays down the road.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 13, 2017



Chris Hilliard

EXHIBIT E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

DECLARATION OF DAVID MAGILL

1. My name is David Magill. I am the VP of Administration and Legal at LISCO, an Iowa telecommunications provider that provides broadband, telephone and pay-TV service in Fairfield, Iowa, and broadband and telephone services to 11 other communities in southeast Iowa. In total, we serve about 2,500 broadband subscribers and 580 pay-TV subscribers. Our recent builds have focused on network extensions to provide communication services for business customers in our communities.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. We obtain access to poles from two investor-owned utilities in our operating footprint. These utilities differ in their business practices, and we have had more success with one utility than the other so we can contrast their practices. The key difference between the two utilities is that one has outsourced their pole management to a third-party survey and engineering firm located out-of-state, and the other has maintained in-house control with locally based staff.

We find that the utility that has maintained in-house control responds to applications more quickly, provides greater clarity on costs, and is generally easier to work with, allowing us to meet customer needs more rapidly and at a lower cost.

4. The utility that has outsourced its pole application process provides little to no transparency into pole application process or costs or make-ready costs. For the initial application, the utility conducts and requires us to pay for engineering assessments of every pole, but these costs are not known until we receive a bill. The utility refuses to conduct joint surveys with us, and we are not told about its surveys until after they are completed. Even more egregiously, until recently, the utility did not provide cost estimates for make-ready, in contravention of FCC rules. Instead, the utility only provided the engineering documentation and recommendations, and left us to figure out whether the utility was planning on requiring pole replacements. Within the past two years the utility has started to provide cost estimates when we request them. However, these are not itemized, so we have no way of assessing their reasonableness. The utility only explicitly says in the application documents if the pole needs to be replaced. In those cases, we forgo the attachment altogether, as pole replacements are generally cost-prohibitive. The proper estimate information should be available beforehand so that we can make a more informed project decision.

5. Should we proceed with pole attachments with the "out-sourced" utility, it sends us a final invoice that only includes a lump sum for application, make-ready, and engineering without a detailed breakdown of the costs. In most of the pole attachment projects, we receive the final invoice years after the works were executed because this utility does not perform timely post-attachment inspections. In one case, we had 36 pole attachments that were done between 2012 and 2014 for which this utility had not yet billed us, and then, in 2016 we received an "un-

itemized" bill for about $96,000. Even after asking, the utility refused to provide a breakdown of these charges, leaving us in the dark with regards to make-ready and engineering costs. The lack of transparency and cooperation creates business challenges that make a working relationship with the utility impractical going forward.

6. In contrast, the "in-house" utility charges a flat $10 fee per pole for engineering for every pole in our applications (assuming a 25-pole minimum). This engineering is conducted more quickly because it is conducted by local staff, so applications are approved in less than the 45-day limit, usually within 21 days. When make-ready is deemed necessary, they provide an itemized cost estimate. This other utility is able to complete the entire make-ready process typically in under three months, allowing us to serve our customers more quickly.

7. Neither of the aforementioned utilities has digital pole databases that we can access. Electronic pole location maps that included information on the possibility of additional attachments in the communications space would be useful. Currently we rely first on Google Earth, then on-site observation to determine whether to submit pole attachment requests.

8. LISCO would find the following changes greatly beneficial to our pole attachment requests:

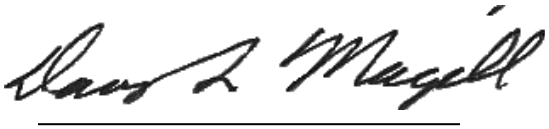
a. A fixed price for the pole application

b. For drops off existing mainline involving no new poles, attacher should be able to notify pole provider without awaiting approval and without additional charge.

c. Invoices should be categorized by which of the four parts of the FCC-specified timeline are involved and by time and materials provided.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 5, 2017



David L. Magill

EXHIBIT F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

DECLARATION OF WILLIAM WEGENER

1. My name is William Wegener. I am the GVP of Engineering and Network Development at Mediacom Communications, a cable operator that provides broadband services to approximately 1.2 million subscribers, video services to approximately 800,000 subscribers, and voice services to 500,000 subscribers in twenty-two states across the nation. In addition, our fastest-growing segment is business services, which grew 9.6% from 2015 to 2016, and now accounts for 14% of our total revenues.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. Mediacom has been investing in fiber infrastructure to upgrade existing networks to provide broadband to new housing developments, business data services to commercial customers, and mobile backhaul connectivity for wireless operators. The planned initiatives under our capital plan include Project Gigabit, a wide-scale deployment of DOCSIS 3.1 to nearly all of our 3 million homes passed; Project Open Road, which will connect tens of thousands of

new commercial locations that contain multiple potential customers; residential line extensions covering at least 50,000 homes passed; and development of community Wi-Fi access points in high-traffic commercial and public areas. As part of our investment, Mediacom builds 300 to 400 new plant miles a year. Approximately 25% of this new plant is aerial. Getting rapid and cost-effective access to existing aerial infrastructure is especially important for us when building out to commercial and wholesale customers. These customers choose Mediacom because we offer lower prices and superior service to incumbent telephone companies—delays in deploying to these customers puts a brake on competition.

4. In recent years, Mediacom has found that investor-owned utilities are seeking to impose requirements that add unreasonable costs and delay attachments. For instance, at one time, utilities generally did not require a pole loading analysis in an application except in areas with extreme weather conditions (e.g. the Gulf Coast in Hurricane season). Utilities and Mediacom agreed that in most instances a visual inspection was sufficient. Now, some utilities are routinely demanding that Mediacom pay for pole loading analysis on every pole in every pole application, even to overlash our existing cables. Because this analysis must be carried out by a Professional Engineer, we must incur additional costs of up to $150 per pole, which can increase project costs by over $5,000 per mile of aerial plant.

5. After this pole loading analysis is submitted, utilities often ask Mediacom to pay for the replacement of "failing" poles. Mediacom often disputes these claims because in many instances where there is a "failing" pole, the pole failure is already occurring and would not be due to the proposed Mediacom attachment.

6. Another problem we encounter is that utilities request that Mediacom pay for pole replacements to remedy violations on poles to which we have been attached for years. From our

experience, these violations arise after utilities perform corrective or preventive maintenance on their equipment and do not replace the poles to maintain the clearance specified in the Pole Attachment Agreement. Utilities then audit their pole plant and find that our attachments are not in compliance with their standards, requiring us to pay for pole replacements. In one case, Empire Electric in Missouri conducted an audit in 1999 after Mediacom acquired systems from US Cable (a subsidiary of Cablevision Systems) and found hundreds of attachments with violations. There was no evidence of a change in the attachment location so we argued that following the construction of the cable plant Empire had the opportunity to conduct a post construction survey and these violations should have been addressed years prior to our acquiring the systems. In checking with the seller we learned that there was a post construction survey and they paid Empire to make the necessary corrections. It was apparent at this point that Empire opted not to make the corrections. Following the audit, the utility asked us to pay for violations that the previous operator had already paid to have corrected. In another instance, in 2014 Mediacom was asked to reimburse Minnesota Power in Aurora and Hoyts Lake, MN for violations on poles to which we have been attached for over 20 years. We performed our attachment in accordance with the engineering documentation and the utility had ample opportunity to conduct the post-make-ready inspection. Instead, the utility executed preventive or corrective maintenance and modified the clearance required for our cables. Mediacom then received a cost estimate in excess of $100,000 for violations as part of the make-ready to allow a third party seeking to access those poles. We found unreasonable and above-market labor charges in this case for works that the utility had failed to address. We rejected those charges on the grounds that existing attachers already pay for pole attachment fees, which are intended to cover management and maintenance costs. In addition, we asserted that all capital costs required

to perform make-ready should be covered by the new attacher as described in existing regulations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 5, 2017

William Wegener